CORPORATE DOMICILE AND THE MYTH OF OFFSHORE TERRITORIAL SOVEREIGNTY

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The Cayman Islands, Bermuda, and the British Virgin Islands are famous vacation destinations that regularly headline the news as "tax havens" facilitating the evasion or avoidance of domestic tax. These jurisdictions, along with a growing number of small offshore jurisdictions, have emerged as major financial havens in recent years hosting thousands of hedge funds, trusts, banks, and insurance companies. But tax is only part of the story.

This Article uncovers how corporate entities limit the enforcement of federal regulatory statutes by establishing their juridical residence in offshore jurisdictions. In particular, recent Supreme Court cases including Morrison v. National Australia Bank *and* RJR Nabisco, Inc. v. European Community *have heightened the burden on private litigants bringing claims involving offshore corporate entities, notwithstanding their substantial connection to the United States. Thus, for instance, an investment fund registered in the Cayman Islands was able to opt out of federal securities fraud claims, even while soliciting American investors within the territory of the United States. This restrictive approach toward the geographic scope of federal statutes creates a space for commercial actors to circumvent regulation aimed at protecting the workings of the market.*

Against this backdrop, this Article strips away the largely presupposed foreign sovereign interests that underlie "offshore" cases—an assumption that plays a vital role in geographically delimiting the application of federal statutes. While the concept of domicile is appropriately used to impute location to corporate entities for "internal affairs" purposes, it is a false indicator for determining the applicable law to govern disputes over matters "external" to corporate entities. Viewed in this light, offshore financial havens represent virtual spaces enabling private entities to convert mandatory rules to default rules, bootstrapped in the myth of offshore territorial sovereignty.

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CONTENTS

INTRODUCTION 3
I. INCORPORATION, TAXES, AND OFFSHORE CORPORATE MIGRATION 11
A. *Offshore Incorporation* 12
B. *Offshore "Headquarters"* 14
1. *Hedge Funds in the Cayman Islands* 15
2. *Insurance Companies in Bermuda* 17
C. *The Prevailing Scholarly Account* 18
II. WHY OFFSHORE CORPORATE MIGRATION MATTERS: THE LINK BETWEEN CORPORATE DOMICILE AND PUBLIC REGULATORY LAW 20
A. *Extraterritoriality in the Post-*Morrison *World* 22
B. *Offshore Application* 26
1. *"Domestic" Fraudulent Transfers under the U.S. Bankruptcy Code* 26
2. *"Domestic" Injuries under the RICO Act* 29
3. *"Domestic" Securities under the Exchange Act* 30
III. CORPORATE DOMICILE AND TERRITORIAL SOVEREIGNTY 32
A. *Territorial Sovereignty under Domestic and International Law* 32
1. *Traditional Conceptions of Territorial Sovereignty* 33
2. *Modern Conceptions of Territorial Sovereignty* 35
B. *Could Corporate Domicile Trigger an Authority to Legislate?* 37
C. *Jurisdictional Competition and Regulatory Arbitrage: A Reassessment* 43
CONCLUSION 49

INTRODUCTION

By some accounts, more than $2.6 trillion in untaxed profits of U.S. companies are held in offshore jurisdictions.[1] These jurisdictions, typically small sun-drenched islands with minimal permanent workforce, in recent years have transformed into major financial havens hosting hedge funds, trusts, insurance companies, and banks.[2] Bermuda, a famous vacation destination in the Atlantic Ocean with a tiny permanent population, is now the world's largest provider of captive insurance—a form of sophisticated self-insurance.[3] The Cayman Islands, located in the Western Caribbean, is estimated to be home to upwards of 60 percent of the world's hedge fund assets,[4] and reportedly the third largest holder of U.S. government debt.[5] This is a phenomenon engineered at least in part by lawyers, judging by the emergence of "offshore magic circle" law firms in recent years that purport to provide full-service law practice ranging from offshore mergers and acquisitions to offshore fund formation.[6]

The visual paradox of tiny islands transforming into hubs of modern finance has attracted the scrutiny of lawmakers and academics alike, most prominently in efforts to curtail tax evasion or avoidance.[7] The United States famously levies corporate tax

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[1] *See* Lynnley Browning, *Trump's Offshore Tax Plan May Mean Perk for Apple, Pfizer*, BLOOMBERG (June 12, 2017), https://www.bloomberg.com/news/articles/2017-06-12/trump-s-offshore-tax-plan-may-mean-extra-perk-for-apple-pfizer; *see also* GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 3-5, 36-45 (2015) (estimating that eight percent of total wealth is held offshore).

[2] *See* RONEN PALAN, RICHARD MURPHY & CHRISTIAN CHAVAGNEUX, TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 9-10 (2010).

[3] CHRISTOPHER BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD 59 (2016).

[4] Jan Fichtner, *The Anatomy of the Cayman Islands Offshore Financial Center: Anglo-America, Japan, and the Role of Hedge Funds*, 23 REV. INT'L POL. ECON. 1034, 1034 (2016) ("About 60% of global hedge fund assets are legally domiciled in Cayman[.]").

[5] Eliza Ronalds-Hannon, *Hedge Funds' Misery Exposed as Caribbean Proxies Dump Treasuries*, BLOOMBERG (June 21, 2016), https://www.bloomberg.com/news/articles/2016-06-21/hedge-funds-misery-exposed-as-caribbean-proxies-dump-treasuries.

[6] *See, e.g.*, APPLEBY, SERVICES, http://www.applebyglobal.com/services/corporate.aspx (last visited July 19, 2017); Mark P. Hampton & John Christensen, *Looking for Plan B: What Next for Island Hosts of Offshore Finance?*, 100 COMMONWEALTH J. INT'L AFF. 169 (2011); *see also* Matthew Valencia, *Storm Survivors*, ECONOMIST (Feb. 16, 2013), http://www.economist.com/news/special-report/21571549-offshore-financial-centres-have-taken-battering-recently-they-have-shown-remarkable (assessing that offshore financial havens grew "often with help from lawyers based in Wall Street or the City of London").

[7] Scholars typically distinguish tax evasion, a set of illicit activities aimed at reducing taxes, from tax avoidance, which include various forms of *legal* maneuvering. *See, e.g.*, Conor Clarke, *What Are Tax Havens and Why Are They Bad?*, 95 TEX. L. REV. 59, 68 (2016) (reviewing GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS (2015)) ("Tax evasion usually refers to the illegal failure to report income. Tax avoidance usually refers to legal . . . forms of tax planning that reduce tax liability.") (internal citation omitted).

based on the corporate entity's place of incorporation, incentivizing corporations operating within the United States to migrate offshore by forming entities incorporated in offshore financial havens.[8] Permutations are endless, but some of the most successful offshore jurisdictions typically levy no corporate or capital gains tax,[9] enabling corporate entities to purchase legal status at a reasonable cost with little or no economic activity in the "host" states.[10]

But tax is only part of the story. As this Article will show, offshore corporate migration can contribute to the erosion of public regulatory law. On first look, public regulatory law appears to be a separate issue from offshore corporate migration. Incorporation decisions, at least in the United States, are typically understood as matters of private choice governing the "internal affairs" of corporate entities.[11] Public regulatory law, on the other hand, reflects social policy generally unamenable to private choice.[12]

Offshore corporate migration matters, however, because corporate domicile has emerged as an important factual input in determining the extraterritorial reach of federal statutes, particularly under a series of recent Supreme Court cases strengthening the presumption against applying federal statutes extraterritorially.[13]

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[8] Throughout this Article, I use the terms "offshore financial havens" and "tax havens" interchangeably to describe sovereign nation states (e.g., the Bahamas) or semi-sovereign states (e.g., the Cayman Islands) with lawmaking authority that attract foreign capital predominantly through offering a combination of light regulation and low taxes. There is no consensus around which jurisdictions constitute "tax havens" or "offshore financial havens." For general definitions, see BRUNER, *supra* note 3, at 19-25.

[9] *Id.* at 19-23.

[10] Throughout the Article, I use the term "state" to refer to both the constituent states of the United States (e.g., California) and nation states (e.g., the Bahamas). I use the term "nation state" where appropriate to avoid confusion with states of the United States.

[11] Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 33-34 (2006). This is no surprise, since corporate law is typically bracketed alongside traditional private law subjects like contracts, trusts, and agency law frequently measured by how rules give effect to private preferences. *See* MARC MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE 1-6 (2013).

[12] For instance, certain federal regulatory statutes, including the Securities Act of 1933 and the Securities Exchange Act of 1934, expressly prohibit parties from avoiding liability through direct contractual waiver. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77n (2012) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.").

[13] *See infra* section II.A. Recent Supreme Court cases largely tethering the scope of federal statutes to the territory of the United States include RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); and Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010). The trio of blockbuster decisions in *Morrison*, *Kiobel*, and *Nabisco* may be a reflection of the current Supreme Court's aversion to adjudicating transnational cases. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1097-99 (2015). Or part of an agenda to rein in private litigants run amok. *See* Paul B. Stephen, *Private Litigation as a Foreign Relations Problem*, 110 AJIL UNBOUND 40 (2016); Carlos M. Vázquez, *Out-Beale-Ing*

Corporate domicile is elevated as a factual input under this line of jurisprudence because it serves as a tangible marker available to impute location to modern financial transactions that appear to defy or simply transcend territorial borders.[14]

The result is an increasing difficulty faced by private litigants in bringing claims under federal regulatory statutes in "offshore" cases, even in cases that are substantially connected to the United States. In addition to intimately playing a role in the largest Ponzi scheme ever recorded in U.S. history,[15] the footprints of offshore financial havens are readily apparent in a significant number of litigation over the potential application of U.S. bankruptcy law,[16] civil RICO,[17] ERISA,[18] excise tax,[19] and securities fraud.[20]

This Article strips away the largely presupposed notion that foreign sovereign interests are triggered by virtue of a corporate entity's juridical location—an assumption that plays a vital role in geographically delimiting the application of federal statutes in "offshore" cases.[21] Consider a hedge fund operated by investment

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Beale, 110 AJIL UNBOUND 68, 72 (2016). Regardless of the motives, there seems to be a consensus around the idea that recent Supreme Court jurisprudence has strengthened the presumption against applying federal statutes extraterritorially. *See infra* section II.B.

[14] Swap transactions, a form of contracts involving the exchange of financial instruments, for instance, "can be between participants in two different countries, booked in a third country, and risk-managed in a fourth country." John C. Coffee Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259, 1274 (2014).

[15] *See* Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. AP 08-01789, 2016 WL 6900689, at *2 (Bankr. S.D.N.Y. Nov. 22, 2016) (bankruptcy proceeding arising out of "the largest Ponzi scheme ever discovered" involving feeder funds formed in the British Virgin Islands and the Cayman Islands).

[16] *See, e.g.*, *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 88, 89 (Bankr. S.D.N.Y. 2012) (U.S. bankruptcy court deferring to insolvency proceeding in Bermuda notwithstanding the acknowledgement that "Gerova may have had significant assets in the United States").

[17] *See, e.g.*, Absolute Activist Value Master Fund Ltd. v. Devine, No. 215-cv-328FTM29MRM, 2017 WL 519066, at *20 (M.D. Fla. Feb. 8, 2017) (civil RICO claim involving Cayman Islands funds dismissed notwithstanding the alleged schemes taking place in Florida by a Florida resident).

[18] *See, e.g.*, *In re* Meridian Funds Grp. Sec. & Employee Ret. Income Sec. Act (ERISA) Litig., 917 F. Supp. 2d 231 (S.D.N.Y. 2013) (extraterritorial application of ERISA relating to a fund organized in the Cayman Islands).

[19] *See, e.g.*, Validus Reinsurance, Ltd. v. United States, 786 F.3d 1039, 1041 (D.C. Cir. 2015) (declining to apply federal excise tax under 26 U.S.C. § 4371 to a Bermudan reinsurance company selling "reinsurance to insurance companies that sell policies covering risks, liabilities, and hazards within the United States").

[20] *See, e.g.*, *In re* Banco Santander Sec.-Optimal Litig., 732 F. Supp. 2d 1305, 1340-41 (S.D. Fla. 2010) (dismissing a claim brought under Rule 10b-5 reasoning that "[t]he funds at issue in this case are registered under the laws of the Bahamas, and the Plaintiffs purposefully went off-shore to invest").

[21] Federal courts recognize foreign sovereign interests through a variety of comity doctrines, including the presumption against extraterritoriality, the act of state doctrine, prescriptive and judicial comity, and foreign sovereign immunity. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2092 (2015) [hereinafter Dodge, International Comity]; Eric A.

managers in New York City that pools investment funds from retirement accounts across the United States. To ensure that these investments do not incur U.S. tax liability from positive portfolio returns, the managers administer the investments through forming a separate "feeder fund" domiciled in the Cayman Islands.[22] While the idea of a corporate entity establishing domicile is a legal construct aimed at imputing a fictional location to a juridical entity, it is a concept that generates factually ascertainable physical contact with a territory of a particular jurisdiction. Forming a feeder fund in the Cayman Islands, for instance, entails paying small registration fees to the government of the Cayman Islands, registering with the local regulator, and hiring a "dummy director" operating within the physical territory of the Cayman Islands.[23] The gist of my argument is that such forms of corporate structuring, regardless of their economic merits, should not be confused with triggering the sovereign interest of the Cayman Islands, unleashing the range of sovereignty arguments available in federal court under the familiar doctrines of the presumption against extraterritoriality and international comity.[24]

To be sure, a corporate entity domiciled in a foreign jurisdiction may *appear* to suggest the existence of a foreign sovereign interest. The domicile of a natural person, for one, is traditionally assumed to be a fairly good indicator of tracking "state interest" in domestic choice of law cases,[25] as well as a widely accepted basis

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Posner & Cass R. Sunstein, Chevronizing *Foreign Relations Law*, 116 YALE L.J. 1170, 1179-80 (2007). The focus of this Article is on the presumption against extraterritoriality doctrine (and prescriptive comity, to the extent that the doctrine is not already woven into the presumption doctrine).

[22] This is a typical design for managers based in the United States operating offshore funds. *See, e.g.*, SEC v. Gruss, 859 F. Supp. 2d 653, 658 (S.D.N.Y. 2012) (describing a fund that was "incorporated, administered, registered, domiciled and regulated in the Cayman Islands" whereas "the actual operational and investment decisions for the Offshore Fund were all made by the Offshore Fund's manager, DBZCO, primarily in DBZCO's New York office") (internal citation and quotation marks omitted).

[23] DELOITTE, ESTABLISHING INVESTMENT FUNDS IN THE CAYMAN ISLANDS, at 5, https://www2.deloitte.com/content/dam/Deloitte/bm/Documents/financial-services/cayman-islands/establishing-investment-funds-in-the-cayman-islands.pdf. Directors typically do not exist in domestic hedge funds. As John Morley explains, these "dummy directors" exist in offshore jurisdictions like the Cayman Islands only "because quirks of law in offshore jurisdictions require it." John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1253 (2014) [hereinafter Morley, Investment Fund].

[24] The relationship between international comity and the presumption against extraterritoriality is somewhat up in the air, due to the Supreme Court's recent inconsistent statements as to whether comity is folded into the presumption analysis. *See infra* section III.A. This is a topic that need not be resolved here. It suffices to note that both are judicial tools aimed at avoiding unintended clashes between domestic law and foreign law. *See* Dodge, International Comity, *supra* note 21, at 2092.

[25] *See infra* section III.A. State interest is a loaded term. In domestic choice of law cases, state interest refers to a prima facie claim that a state's law (e.g., New York law) should apply in a case connected to more than one state (e.g., New York and Connecticut). *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 394 (1980) [hereinafter Brilmayer,

upon which a nation state can enact law to regulate conduct under international law.[26] Moreover, incorporation decisions are generally byproducts of deliberate private choice that carry weight in certain areas of the law, perhaps most prominently in American corporate law.[27] Under the internal affairs doctrine, it is settled law that a corporation can choose its legal domicile "independent of physical presence,"[28] which in turn decides the legal relationship between the firm's directors and shareholders.[29]

A closer examination, however, reveals that corporate domicile alone cannot plausibly give rise to a territorial sovereignty claim, at least in the context of a nation state exercising prescriptive jurisdiction (i.e., the authority to legislate, thus also referred to as legislative jurisdiction).[30] Importantly, prescriptive jurisdiction concerns the lawmaker's authority "to regulate conduct—namely, the location of the conduct."[31] A claim to regulate conduct based solely on the location of a juridical

Legislative Intent]. Interest analysis, a related term developed by Brainerd Currie, is one intimately familiar to modern conflict of laws teachers. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). I use the term not because I follow all of Currie's theoretical approaches, many that have been thoroughly discredited. *See* Lea Brilmayer, *What I Like Most About the Restatement (Second) of Conflicts, and Why it Should not be Thrown out With the Bathwater*, 110 AJIL UNBOUND 144, 145 (2016); John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981). But the term captures an important theoretical advancement—that law is not an objectively existing entity deduced by territorial postulates, as Joseph Beale had his contemporaries believe in the early twentieth century, but rather that the law is a tool of social policy. *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2461 (1999). I share this premise with more modern writers. *See, e.g.*, Larry Kramer, *The Myth of the Unprovided-For Case*, 75 VA. L. REV. 1045 (1989).

[26] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987).

[27] Stephen J. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 VA. L. REV. 961, 961 (2001) ("Corporations within the United States have long enjoyed the right to choose the corporate law regime that governs their internal affairs.").

[28] Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 844 (1992).

[29] Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 887 n.6 (1990) ("The location of the corporate domicile is important because state corporation codes vary significantly and the internal affairs of a corporation (such as what powers belong to the board of directors, what limitations can be placed on their compensation, what kinds of self-interested transactions can members of the board of directors enter into, what duties must directors and officers perform, and in what ways can directors and officers be found liable for breaches of those duties) are governed by the general corporation law of the state of incorporation-even if the corporation's principal office, all of its physical assets, and its principal place of business are in other states[.]").

[30] *See* Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 2-3 (2001) ("Prescriptive jurisdiction (and its private law cognate, choice of law) is the term used to refer to the critical question of allocation of public authority in a horizontal interstate system.") [hereinafter Trachtman, Economic Analysis].

[31] Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1305 (2014); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987) (stating that a state has "jurisdiction to prescribe law with respect to . . . the status of persons, or

entity is a claim bootstrapped in legal fiction that reveals little to nothing about the location of the conduct that the law would seek to regulate. While domicile is a concept used to impute location to corporate entities for a variety of purposes,[32] it rarely aligns with the location of the actors that the law would seek to regulate.

This metaphysical assertion becomes more concrete when we unpack what the concept of corporate domicile entails. Unlike domicile of a natural person, which typically entails an individual establishing her "headquarters" with an overwhelming territorial relationship with a particular jurisdiction,[33] corporate domicile is a form of private contract aimed at opting out of a bundle of rules imposed by one legal regime in favor of another. Offshore financial havens typically have no plausible claim to prescribe conduct underlying offshore financial transactions because the decision-making authority of relevant commercial entities lies not in the place of incorporation, but in "nerve centers" located in "onshore" jurisdictions, including in the United States.[34] The auxiliary territorial markers used to effectuate this contract (e.g., maintaining a mailbox in a particular territory) does not alter this equation, unless the place of incorporation happens to accompany some form of real economic activity.

Stripped of the territorial sovereignty rationale, the Supreme Court's recent extraterritoriality jurisprudence can be evaluated on its own policy merits: creating relatively clear rules tethering the horizontal scope of federal statutes to the territory of the United States. Importantly, in the modern era defined by capital mobility and online transactions, this line of territory-oriented jurisprudence facilitates various

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interests in things, present within its territory"); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1241 (1992) ("International law . . . recognizes the defendant's nationality as an adequate basis for application of local law.").

[32] The place of incorporation determines the wide range of "internal affairs" of a corporate entity. *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982). Courts have also imputed situs to intangibles like corporate stock as if they are sited at the domicile of the corporation. *See* Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 279 (2015).

[33] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 16 (AM. LAW INST. 1971); *see also* Jack L. Goldsmith III, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597, 603 (1989) ("The model of a person having one and only one permanent and specific residence correlates fairly well with reality.") [hereinafter Goldsmith, Interest Analysis].

[34] The term "nerve center" should sound familiar to teachers of civil procedure. The term is used to determine a corporation's principal place of business for diversity jurisdiction purposes. *See* Hertz Corp. v. Friend, 559 U.S. 77, 78 (2010) ("The phrase 'principal place of business' in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities[.]") (quoting 28 U.S.C. § 1332(c)(1) (2012)). As I will show in section III.A, the location of the actors with the decision making authority is significant in deducing the reach of a jurisdiction's lawmaking authority. I am in no way suggesting that prescriptive jurisdiction should generally be conflated with judicial (adjudicative) jurisdiction, the latter which concerns the authority over subjecting parties to a judicial process. *See* Colangelo, *supra* note 31, at 1305.

forms of regulatory arbitrage,[35] converting otherwise mandatory laws of the United States into default rules under the shadow of being governed by the laws of offshore financial havens.

This may or may not be a good thing. Indeed, when viewing laws as "products,"[36]—a view that dominates American corporate law—getting the regulatory state out of the kitchen promises to enhance predictability essential for private transactions to flourish. As an added benefit, offshore financial havens may enable a jurisdictional competition between nation states to supply better sets of default laws for private actors.[37]

But there are ample reasons to be cautious. First, even from an efficiency standpoint, the potential for externalities (i.e., impact on third parties) renders jurisdictional competition theories, which typically rely on the assumption that private transactions do not impact third parties,[38] empirically unproven at best.[39] Perhaps more importantly, public regulatory law often reflects social policy that may

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[35] *See infra* section III.B; *see also* Christian Johnson, *Regulatory Arbitrage, Extraterritorial Jurisdiction and Dodd-Frank: The Implications of US Global OTC Derivative Regulation*, 14 NEV. L.J. 542, 542 (2014) ("Given the probable costs and burdens of the US regulatory approach, it is likely that both non-US persons and US persons will try to trade OTC derivatives in less-regulate jurisdictions.").

[36] For a seminal account, see Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); *see also infra* section I.C (summarizing prevailing scholarly account advocating jurisdictional competition).

[37] An important perspective here are works of Erin O'Hara and Larry Ribstein, who have written in favor of enhancing the ability of private entities to select the law governing their transactions. *See, e.g.*, ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152-57 (2000). Scholars have extended this framework, in some respects, to the offshore financial haven context. *See, e.g.*, Jonathan Macey & Anna Manasco Dionne, *Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving Toward Efficient?*, 8, 8-10, *in* OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION (Andrew P. Morriss ed., 2010).

[38] Jurisdictional competition theories typically trace their intellectual origin to Charles Tiebout's famous Tiebout model, which holds that the ability of people to move from one community to another puts competitive pressures on jurisdictions to provide an optimal level of local public goods. *See* Charles E. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Among many assumptions made in the Tiebout model is the absence of externalities. *See* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 231-32 (1997) ("The Tiebout model unrealistically assumes the absence of externalities. . . . [I]ndividual actions often have external effects. This occurs whenever one's actions impact on the interests of others and one fails to account for such impact.").

[39] Trachtman, Economic Analysis, *supra* note 30, at 1-6. Indeed, negative externalities in the financial contracting context is relatively well-known. *See, e.g.*, Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. REV. 83, 97 (2013) ("Contractual innovations can also generate negative externalities. The classic example is that of financial contracts which magnify contracting parties' risk of insolvency and thereby jeopardize their creditors' solvency. In extreme cases, these kinds of innovations can throw entire economies into turmoil.").

not align with private incentives.[40] Regulatory evasion is particularly problematic because the laws of offshore financial havens are often straightforward cases of legislative capture, where laws are literally written by interested private actors for the express purpose of evading domestic law.[41] The policy danger, at its extreme, is the emergence of a regulatory lacuna where no sovereign regulates forms of misconduct that could have substantial impacts on the general public. While I readily agree with efficiency-oriented theorists that corporate entities ought to be able to choose the rules governing their internal affairs, disputes over matters "external" to the entities—including many regulatory statutes—should not be amenable to private choice.

This is a subject that deserves wider scrutiny.[42] While small offshore jurisdictions have received sustained scrutiny by tax scholars, they are relatively unexamined hotbeds of transnational disputes laden with high financial stakes and fundamental theoretical questions. Rather than seeking to have the last word, this Article presents a broad sketch that future research can build on to further shed light on the topic.

The remainder of this Article is organized in three Parts. Part I documents the dramatic rise of offshore financial havens in facilitating financial transactions in recent decades, becoming a central feature of the modern economy. It frames this discussion drawing on tax and regulatory arbitrage scholarship, and identifies an important gap left in the prevailing account. Part II contains the descriptive contribution of this piece, identifying the previously undetected relationship between corporate form and the applicability of domestic regulatory statutes. In particular, this Part highlights recent cases that predominantly (albeit not categorically) favor

[40] This is not particularly surprising. As explained by Ralf Michaels, private law-based perspectives privilege individual interests over social policy reflected in the mandatory laws of a nation state. *See* Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73, 79 (2008) ("When all focus is on the interests of individuals, other policy considerations—especially those promulgated by states as mandatory laws—are suspect.").

[41] *See infra* section III.B.

[42] This is a topic that will increasingly become important, both from practical and theoretical standpoints. For most of the last two centuries, extraterritorial financial regulation was hardly a prominent issue because the objects of financial regulation were "in large part domestic actors, and the bulk of the risks their activities generated were local." Chris Brummer, *Territoriality as a Regulatory Technique: Notes from the Financial Crisis*, 79 U. CIN. L. REV. 499, 503 (2010). Needless to say, this is no longer the case in today's globally-interconnected financial economy. *See* David Zaring, *The Legal Response to the Next Financial Crisis*, 24 GEO. MASON L. REV. 533, 537-38 (2017); *see also* David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 689 (2012) ("[W]ith globalization, markets — and rogue market participants — can cross borders easily, while regulators can do so only with difficulty (with, for example, the controversial extraterritorial application of domestic rules). Globalization, accordingly, often means that regulators are faced with the prospect of oversight over only a small part — the domestic part — of a large, international financial intermediary, which may be engaged in activities with radically different levels of risk from jurisdiction to jurisdiction.").

delimiting federal statutes in "offshore" cases,[43] critically assessing the impact of the Supreme Court's recent federal extraterritoriality jurisprudence. Part III develops an account conceptualizing corporate domicile as a specie of transnational private contract, revealing the limited utility of a corporation's juridical home in identifying a sovereign's authority to regulate conduct. This Part also identifies policy considerations that counsel against a doctrinal framework that renders public regulatory statutes amenable to private choice. A short conclusion follows.

I. INCORPORATION, TAXES, AND OFFSHORE CORPORATE MIGRATION

By now, everyone at least has a vague intuition of what tax havens are all about. It is, after all, a subject that has catapulted the seemingly dry academic subject of taxation into a staple headliner of the *New York Times*.[44] While the earliest forms of tax havens can be traced to the late nineteenth century,[45] American corporations started experimenting with tax havens in the years following World War II,[46] with their use accelerating in pace and scope in recent decades.[47] This Part explains the rise of offshore financial havens and identifies an important gap left in the existing academic treatment of the subject.

A brief word on terminology may be useful here before we proceed. By corporate domicile, I primarily (but not exclusively) refer to a corporate entity's place of incorporation. I say "not exclusively" because firms operating in certain sectors of finance are able to (or at least claim to) locate their headquarters in

[43] While this Article focuses on federal court jurisprudence, the spatial scope of national and sub-national law is also routinely litigated in state courts and arbitration proceedings. *See* Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, 257, 260-61, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stephen Kroll eds., 2011); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 554-55 (2012).

[44] *See, e.g.*, Andrew Ross Sorkin, *When It Comes to Tax Avoidance, Donald Trump's Just a Small Fry*, N.Y. TIMES (Oct. 4, 2016), http://www.nytimes.com/2016/10/04/business/dealbook/when-it-comes-to-tax-avoidance-donald-trumps-just-a-small-fry.html.

[45] Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 153 (2002) (tracing the "emergence of the first modern tax havens" to "the last years of the nineteenth century") [hereinafter Palan, Commercialization].

[46] *See* William W. Park, *Fiscal Jurisdiction and Accrual Basis Taxation: Lifting the Corporate Veil to Tax Foreign Company Profits*, 78 COLUM. L. REV. 1609, 1613 (1978) ("In the years following World War II, many American companies established foreign subsidiaries in countries with little or no income taxation. American insurance companies were among the greatest offenders in the use of such 'tax havens.'").

[47] BRUNER, *supra* note 3, at 1-5.

offshore financial havens without physically moving offshore.[48] I use the term generically to capture the instances where corporate entities use offshore financial havens to establish juridical residence, while leaving the nerve center—where officers or managers direct, control, and coordinate the corporation's activities—elsewhere.[49] While there will inevitably be blurry lines, relatively few corporate entities incorporated in offshore financial havens currently have significant physical presence in those jurisdictions.[50]

A. *Offshore Incorporation*

At the heart of the various tax avoidance strategies available to business entities today is the U.S. tax rule known as the "place of incorporation" rule.[51] This rule determines the corporation's legal location as a purely formal criterion based on the entity's place of incorporation,[52] permitting firms headquartered or managed in the

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[48] This is unsurprising, given that the single most important reason for the success of tax havens "lie in their ability to provide protection from national regulation and taxation without the need to physically relocate to the host country." Palan, Commercialization, *supra* note 45, at 163.

[49] This definition essentially mirrors the Supreme Court's test for determining a corporation's principal place of business for diversity jurisdiction purposes. *See* Hertz Corp. v. Friend, 559 U.S. 77, 78 (2010) ("The phrase 'principal place of business' in § 1332(c)(1) refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities[.]") (quoting 28 U.S.C. § 1332(c)(1) (2012)).

[50] A very high percentage of corporate entities registered in offshore financial havens are "exempted" entities, meaning that they are formed for the express purpose of doing business outside of those jurisdictions. *See* CONYERS DILL, BERMUDA EXEMPTED COMPANIES, at 5, https://www.conyersdill.com/publication-files/2016_12_BDA_Bermuda_Exempted_Companies.pdf ("Bermuda law distinguishes between those companies which are owned predominantly by Bermudians ('local companies') and those which are owned predominantly by non-Bermudians ('exempted companies'). Only local companies are permitted to carry on and compete for business which is in Bermuda."). For instance, a U.S. government investigation revealed that approximately 96 percent of corporate entities registered to a popular registration office in the Cayman Islands were "exempt companies, exempt limited partnerships, and exempt trusts." U.S. GOV'T ACCOUNTABILITY OFFICE, CAYMAN ISLANDS: BUSINESS AND TAX ADVANTAGES ATTRACT U.S. PERSONS AND ENFORCEMENT CHALLENGES EXIST 12 (2008), http://www.gao.gov/new.items/d08778.pdf [hereinafter GAO Report]. Another study found that 25.5 percent of hedge funds were legally registered in the Cayman Islands, while only 0.3 percent of the funds were physically managed from the Cayman Islands. *See* MICHAEL BROCARD & FRANCOIS-SERGE LHABITANT, A PRIMER ON THE TAX FRAMEWORK OF OFFSHORE AND ONSHORE HEDGE FUNDS 3-4 (2016), https://www.edhec.edu/sites/www.edhec-portail.pprod.net/files/publications/pdf/edhec-working-paper-a-primer-on-the-tax-framework-f_1467203960443-pdfjpg.

[51] *See* I.R.C. § 7701(a)(4). This need not be the rule. Several prominent jurisdictions around the world peg corporate residency to the location of corporate headquarters for tax purposes. *See* ROBERT COUZIN, CORPORATE RESIDENCE AND INTERNATIONAL TAXATION 25 (2002).

[52] *See* Omri Marian, *Home-Country Effects of Corporate Inversions*, 90 WASH. L. REV. 1, 3 (2015) ("[U]nder the Internal Revenue Code (IRC) corporate tax residence is determined based on the place of incorporation[.]").

United States to avoid U.S. taxpayer status by re-incorporating in foreign jurisdictions.[53] The incentive to move to an offshore jurisdiction is emboldened by two additional factors well known to tax lawyers. First, the United States imposes a statutory 35 percent corporate tax rate, substantially exceeding other developed economies that levy 25 percent on average, and certainly much greater than the going tax haven rate of zero percent.[54] Second, the United States taxes income on U.S. entities on a worldwide basis, instead of levying taxes on income earned inside the territorial borders.[55] Practically, this means that no matter where a corporation incorporated in the United States earns its income, it will be taxed at a higher rate once the income is brought back to the United States.[56]

While the more elaborate tax planning tactics span multiple continents around the world in complex legal structuring going by names like "the double Irish Dutch sandwich,"[57] the most basic form of corporate tax planning involves a domestic entity forming an affiliate entity in an offshore financial haven to reduce its effective tax rate. For instance, Houston-headquartered Cooper Industries, Inc. moved its place of incorporation from Ohio to Bermuda, touting that it would "reduce its effective tax rate from about 35% to 18-23%."[58] It is no surprise, then, that the dominant offshore jurisdictions attracting corporate relocation levy nil to zero corporate income tax.[59] Incorporating in offshore jurisdictions enable corporations operating worldwide to pay "only on U.S.-source income and offers other opportunities to shelter U.S. income through transfer pricing, income stripping, and other techniques."[60]

The widespread practice of corporate inversion—a series of complex transactions undergone by a U.S. corporation to reincorporate in a foreign jurisdiction—suggests that the trend towards offshore corporate migration will continue.[61] In my count of

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[53] Daniel Shaviro, *The Rising Tax-Electivity of U.S. Corporate Residence*, 64 TAX L. REV. 377 (2011); Eric J. Allen & Susan Morse, *Tax-Haven Incorporation for U.S.-Headquartered Firms: No Exodus Yet*, 66 NAT'L TAX J. 395, 395-96 (2013).

[54] Allen & Morse, *supra* note 53, at 400.

[55] Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 813 (2015).

[56] *Id.* ("Domestic corporations pay taxes on the entirety of their income, regardless of where it is earned—a worldwide tax regime. . . . In practice, the United States's worldwide tax regime means that no matter where a domestic corporation earns its income, the income will be taxed at the higher U.S. rate once repatriated to the United States.").

[57] For an excellent explanation of how this structuring works, see Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 662-64 (2017).

[58] Hwang, *supra* note 55, at 827.

[59] This includes the usual suspects, including the Cayman Islands, the Isle of Man, Jersey, Vanuatu, Bermuda, and the British Virgin Islands. *See* PALAN, MURPHY & CHAVAGNEUX, *supra* note 2, at 30-33.

[60] Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 246 (2010).

[61] Gregory Day, *Irrational Investors and the Corporate Inversion Puzzle*, 69 SMU L. REV. 453, 454 (2016).

recently announced inversion transactions tracked by Eric Talley,[62] Bermuda and the Cayman Islands together accounted for a staggering 40 percent of U.S.-based companies legally migrating to foreign jurisdictions.[63] The figure jumps to 64 percent when including five additional well-known tax havens to the mix—Antigua, the British Virgin Islands, the Marshall Islands, and Ireland.[64] While various legislative and regulatory actions have reacted to the alarming rates of what one commentator has described as "the new corporate migration,"[65] it is too early to determine whether these efforts will accomplish their intended goals.[66]

B. Offshore "Headquarters"

While incorporating in an offshore tax haven remains the primary method employed in tax planning strategies, business entities in certain financial sectors have set up their headquarters in offshore jurisdictions. This may surprise anyone who studies the demographics of some of the most successful offshore financial havens. For instance, the Cayman Islands, with a total land mass about 1.5 times the size of Washington D.C. and a permanent population of 57,268 people,[67] is said to house thousands of investment funds.[68]

But perhaps the problem is our overly myopic intuition that corporate activities ought to have extensive territorial contact with a particular jurisdiction. Financial instruments that constitute the bread and butter of the financial sector, in essence, are contracts that rely on legal systems to enforce rights.[69] Unlike industries that rely on productive activities tied to an identifiable parcel of territory (think, for instance, automobile manufacturing in Detroit), financial transactions are *legally constituted*.[70] Because finance is built and constituted by systems of rules, it does not have to be

[62] Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015).

[63] *Id.* at 1748-51 (Appendix B).

[64] *Id.*

[65] Hwang, *supra* note 55, at 807.

[66] *See* Day, *supra* note 61, at 461-65 (describing recent measures aimed to prevent U.S. corporations from migrating to foreign jurisdictions for tax purposes).

[67] CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: CAYMAN ISLANDS, https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html (last updated June 26, 2017).

[68] DAVID CAY JOHNSTON, FREE LUNCH: HOW THE WEALTHIEST AMERICANS ENRICH THEMSELVES AT GOVERNMENT EXPENSE 218 (2007) ("Hedge funds are legally organized offshore, the favorite spot being the Cayman Islands. . . . Most hedge-fund managers have never even been to the Cayman Islands, making the headquarters arrangement a farce."); *see also* DELOITTE, *supra* note 23, at 5 (reporting total number of 11,061 funds registered in the Cayman Islands as of June 2015).

[69] Katrina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 315 (2013) ("Financial assets are contracts the value of which depends in large part on their legal vindication.").

[70] *Id.* at 316-18.

territorial at all.[71] This is particularly true for entities like hedge funds or mutual funds that do not serve direct customers.[72]

It is for this reason that firms in several important sectors of finance have been able to structure their operations to locate "the head office in an offshore center with the onshore activities organized into affiliates of the offshore headquarters."[73] Although examples abound, this section will focus on two salient contemporary examples to illustrate how commercial entities can be headquartered in offshore jurisdictions without (for the most part) physically moving their operations offshore: hedge funds in the Cayman Islands and insurance companies in Bermuda.

1. Hedge Funds in the Cayman Islands

Hedge funds are investment funds that pool capital from individual and institutional investors aiming to make a positive market return through investing in securities and other assets.[74] To understand how the Cayman Islands, with a tiny permanent workforce, has become the largest host of the world's hedge funds,[75] one needs to understand the basic legal structure of hedge funds. A hedge fund typically consists of three basic entities: "the fund itself, the fund's management company, and the fund's equity investors."[76] In a typical offshore design, the fund's

[71] *See* William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. (forthcoming 2018) (reviewing CHRISTOPHER BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016)) [hereinafter Moon, Tax Havens].

[72] Edward D. Kleinbard, *Competitive Convergence in the Financial Services Markets*, 81 TAXES 225, 230-31 (2003).

[73] PHILIP R. LANE & GIAN MARIA MILESI-FERRETTI, CROSS-BORDER INVESTMENT IN SMALL INTERNATIONAL FINANCIAL CENTERS 5 (2010). As William Magnunson explains, the unprecedented mobility of capital has allowed "companies to operate on a global basis from headquarters in the Cayman Islands or the Seychelles, countries recognized as tax havens." William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521, 537 (2016).

[74] John Morley, *The Regulation of Mutual Fund Debt*, 30 YALE J. ON REG. 343, 347-48 (2013); William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1382-83 (2007) ("Some specialize in securities of distressed firms, while others make directional bets on the movement of currency exchange or interest rates. Still others pursue convertible arbitrage, going long in a convertible bond and shorting the underlying common stock.").

[75] Houman B. Shadab, *Hedge Fund Governance*, 19 STAN. J.L. BUS. & FIN. 141, 155 (2013). Some estimate that around 85 percent of the world's hedge funds are "domiciled in the Cayman Islands[.]" MOURANT OZANNES, THE CAYMAN ISLANDS: A GUIDE FOR HEDGE FUND MANAGERS 1 (2017), https://www.mourantozannes.com/file-library/media---2017/2017-guides/the-cayman-islands---a-guide-for-hedge-fund-managers.pdf.

[76] Shadab, *supra* note 75, at 150.

management company is composed of investment professionals who operate "onshore," while the hedge fund itself is in one of the offshore financial havens.[77]

Managers based in the United States typically set up standalone corporate entities called "feeder funds" in offshore jurisdictions principally to cater to two clients: tax-exempt U.S. entities (like university endowments and pension funds), and foreign investors.[78] Feeder funds are important because they help funds avoid triggering U.S. tax liability for both U.S. tax exempt entities and foreign investors.[79] As an added benefit, Cayman Islands law enables investors to set up opaque financial structures that provide a degree of anonymity from U.S. regulators.[80] These are among the key incentives for offshore funds to keep the *appearance* of foreign territorial operations.[81] As a hedge fund consultant based in the Cayman Islands explains in a *Forbes* spread, "[i]n order to ensure that your fund is not seen as being run within the U.S., it's common practice to have a majority of non-U.S. directors on the board of the fund itself."[82] Indeed, several offshore jurisdictions require by law for foreign-

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[77] SEC v. Gruss, 859 F. Supp. 2d 653, 658 (S.D.N.Y. 2012) (describing a typical offshore fund structure, where the fund was "incorporated, administered, registered, domiciled and regulated in the Cayman Islands" whereas "the actual operational and investment decisions for the Offshore Fund were all made by the Offshore Fund's manager, DBZCO, primarily in DBZCO's New York office") (internal citation and quotation marks omitted).

[78] Summer A. Lepree, *Taxation of United States Tax-Exempt Entities' Offshore Hedge Fund Investments: Application of the Section 514 Debt-Financed Rules to Leveraged Hedge Funds and Derivatives and the Case for Equalization*, 61 TAX LAW. 807 (2008).

[79] *See* DOUGLAS L. HAMMER, U.S. REGULATION OF HEDGE FUNDS 361 (2005). U.S. tax-exempt entities, for instance, may face domestic tax liability on "unrelated business taxable income," commonly referred to as UBTI. Offshore feeder funds, also known as blocker corporations, help avoid triggering this tax liability. *See* FUND ASSOCS., OFFSHORE HEDGE FUNDS VS. ONSHORE HEDGE FUNDS 4 (2008), http://fundassociates.com/pdfs/Offshore_vs_Onshore_Funds_Whitepaper.pdf. Similarly, while a foreign investor may possibly trigger tax liability by being considered to be engaged in a U.S. business, investing through an offshore feeder fund "blocks" this potential exposure at the offshore level. *See* PEPPER HAMILTON, LLP, A PRACTICAL GUIDE TO U.S. TAX COMPLIANCE ISSUES FOR HEDGE FUND OF FUNDS 4 (2008), http://www.pepperlaw.com/uploads/files/fundoffunds_schneidman_1008.pdf.

[80] Jan Fichtner, *The Anatomy of the Cayman Islands Offshore Financial Center: Anglo-America, Japan, and the Role of Hedge Funds*, 23 REV. INT'L POL. ECON. 1034, 1037 (2016).

[81] BROCARD & LHABITANT, *supra* note 50, at 23. The offshore structure allows the hedge fund to accomplish tax benefits, as well. As a widely-cited *New York Times* piece explained in 2007, "major investors to avoid taxes of up to 35 percent that the Internal Revenue Service levies on unearned business income" while Cayman tax laws help "American fund managers legally defer domestic taxes on their personal profits by channeling them offshore through their funds." Lynnley Browning, *Offshore Tax Breaks Lure Money Managers*, N.Y. TIMES (July 1, 2007), http://www.nytimes.com/2007/07/01/business/yourmoney/01cay.html. There has been somewhat of a legislative cat and mouse game, as the longstanding practice of offshore fund management and performance fees deferral is no longer possible for U.S. taxpayer.

[82] Ky Trang Ho, *Why Hedge Funds Love to Go to OffShore*, FORBES (May 9, 2015), https://www.forbes.com/sites/trangho/2015/05/09/why-hedge-funds-love-to-go-offshore/#240463481107; *see also* Shadab, *supra* note 75, at 156 ("From a governance point of view,

based funds to establish some form of contact with the jurisdiction, including directors that play little or no role in the management of the funds.[83]

Absent this legal structure, offshore funds are run by U.S.-based managers no differently than typical onshore funds. As Houman Shadab explains, "management companies enjoy the same general plenary powers over offshore funds' investments and other operations as they do with onshore funds."[84]

2. *Insurance Companies in Bermuda*

Bermuda, a tiny island in the Atlantic Ocean familiar to Americans as a tourist destination, is now the "third largest insurance market in the world."[85] The island boasts its status as the largest supplier of both "reinsurance business" (essentially insurance for insurers), as well as the "captive insurance market" (a sophisticated form of self-insurance of a parent company through a subsidiary insurer).[86]

To understand how Bermuda became a magnet for insurance companies—particularly ones that focus on providing coverage to U.S.-based risks—one needs to understand the structure of the insurance industry. Unlike territory-reliant industries, the insurance industry does not require "significant fixed assets and enormous workforce."[87] Importantly, the insurance industry relies heavily on nonemployee agents and brokers, rendering a legal structure where the insurer typically has no direct customer relationship with the insured. As explained by Edward Kleinbard, "a reinsurer can in fact have a commercial presence in the primary insurer's jurisdiction through the retention of an agent of independent status, thereby facilitating its reinsurance business in respect of risks in that jurisdiction."[88]

Through this process, U.S. insurance companies owned by Bermuda parent companies reduce the tax burden on their insurance activities without bringing the foreign parent companies into the U.S. net income tax system.[89] Thus, the parent entities can "minimize taxation on passive portfolio income such as interest and dividends, in part because of the low or zero tax-haven rate."[90] The result is being

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the most distinguishing aspects of offshore hedge funds is that, unlike most of their U.S.-based peers, offshore hedge funds typically have a board of directors . . . . In practice, the oversight role hedge fund directors play is likely not substantial.").

[83] *See* Morley, Investment Fund, *supra* note 23, at 1253.

[84] Shadab, *supra* note 75, at 155.

[85] CHRISTOPHER BICKLEY, BERMUDA, BRITISH VIRGIN ISLANDS AND CAYMAN ISLANDS COMPANY LAW 3 (2013).

[86] BRUNER, *supra* note 3, at 59.

[87] Kleinbard, *supra* note 72, at 235.

[88] *Id.* at 236.

[89] *Id.*

[90] Allen & Morse, *supra* note 53, at 412.

able to provide coverage to U.S.-based risks operating in the United States, while maintaining minimal physical presence in Bermuda.

C. The Prevailing Scholarly Account

Until fairly recently, the study of offshore financial havens was almost completely monopolized by tax scholars in legal scholarship.[91] The important body of work here demonstrates the vast impact that offshore jurisdictions can have in the global economy, ultimately impacting domestic policy. In a seminal work, for instance, Reuven S. Avi-Yonah documented how tax havens allow "large amounts of capital to go untaxed, depriving both developed and developing countries of revenue and forcing them to rely on forms of taxation less progressive than the income tax."[92] Against this backdrop, Avi-Yonah proposed "coordinated imposition of withholding taxes on international portfolio investment," [93] as well as taxing multinational corporations "initially in the jurisdictions where their goods and services are consumed." [94] Recent works continue the tradition of investigating unilateral and multilateral solutions to reduce tax evasion or avoidance.[95]

Within the past two decades, legal scholars have increasingly turned attention to the interrelationship between corporate law and tax law. As explained by Mitchell Kane and Ed Rock, while offshore incorporation is "unabashedly all about tax reduction,"[96] it also concerns corporate law because it requires corporate entities to opt into "a different, possibly inferior, corporate law regime."[97] This view is now fairly well accepted. As Victor Fleischer observes, "[i]n some circumstances, managers will opt to minimize taxes by choosing a tax haven or tax-friendly

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[91] For one of the earliest accounts, see Walter W. Bruno, *Tax Considerations in Selecting a Form of Foreign Business Organization*, 13 VAND. L. REV. 151 (1959). Outside of legal scholarship, offshore jurisdictions have long been studied both by economists and political scientists. *See* RONEN PALAN, THE OFFSHORE WORLD: SOVEREIGN MARKETS, VIRTUAL PLACES, AND NAMAD MILLIONAIRES 8-9 (2003) (reviewing existing accounts).

[92] Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1575, 1575 (2000).

[93] *Id.*

[94] *Id.*

[95] *See, e.g.*, Andrew Blair-Stanek, *Intellectual Property Law Solutions to Tax Avoidance*, 62 UCLA L. REV. 2 (2015); Tracy A. Kaye, *Innovations in the War on Tax Evasion*, 2014 BYU L. REV. 363; Samuel D. Brunson, *Repatriating Tax-Exempt Investments: Tax Havens, Blocker Corporations, and Unrelated Debt-Financed Income*, 106 NW. U. L. REV. 225 (2012).

[96] Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1230 (2008).

[97] *Id.*; *see also* Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 314 (2004) ("The conversion of a U.S. based multinational into a foreign corporation to only alter the tax exposure of the corporate group, but also changes the laws that govern intra-corporate relations.").

jurisdiction, even if that jurisdiction is suboptimal from the standpoint of corporate law."[98]

Others are more optimistic about the virtues of offshore financial havens, relying on the corporate charter competition experience in the United States. In the United States, corporate law—the body of law governing the relations between the firm's managers and shareholders—is largely a matter of state law.[99] Corporate entities can choose to be governed by a particular state's laws simply by electing to incorporate in that state. Privately selected corporate governance rules are said to be welfare enhancing, and encourage jurisdictional competition between states resulting in innovative corporate governance rules.[100] This competition is enabled by private entities being able to choose the corporate law of any state without establishing territorial presence in the chosen state.[101]

Scholars have extended this framework to the international jurisdictional competition context in areas tertiary to corporate law. Offshore financial havens purportedly provide an array of differentiated regulatory rules unavailable in the United States. This typically includes the absence of accounting rules and disclosure rules—along with other "regulatory compliance" costs—that an entity would be subjected to operating in the pure domestic context.[102] Jonathan Macey and Anna Manasco Dionne, for instance, argue that competition introduced by offshore jurisdictions leads to financial and regulatory innovation.[103] Some proponents of

[98] Fleischer, *supra* note 60, at 276.

[99] Tung, *supra* note 11, at 33. Historically, this was not the case. Prior to the late nineteenth century, corporate activities were primarily local, and corporate law was largely monopolized by the state where the corporation conducted its business. Capital mobility and the growth of inter-state business effectively broke this monopoly, for "[l]egislatures could not afford to . . . driv[e] business out of state to the detriment of local interests." *Id.* at 46.

[100] ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1-5 (1993). *But see* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1435 (1992) (arguing that "the presence of managerial opportunism and externalities may lead states to adopt undesirable corporate law rules").

[101] Romano, *supra* note 36, at 225-27. Delaware is widely regarded as the winner of this competition. The advantages of Delaware corporate law are well-known. In addition to the state legislature enacting cutting edge corporate law, the Delaware Court of Chancery, staffed with renowned business law jurists, is famous for producing a refined body of corporate law that reduces uncertainty, ultimately benefiting both the managers and shareholders. *See, e.g.*, LEWIS S. BLACK, JR., WHY CORPORATION CHOOSE DELAWARE 1-7 (2007); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) (attributing Delaware's success in attracting corporate charters to "the unique lawmaking function of the Delaware courts").

[102] Marco Becht, Colin Mayer & Hannes F. Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, 14 J. CORP. FIN. 241, 242 (2008); *see also* Magnuson, *supra* note 73, at 527 n.17 ("There is strong evidence that corporations choose their country of incorporation based on regulatory costs, including minimum capital requirements and setup costs.").

[103] Macey & Dionne, *supra* note 37, at 8-10.

inter-jurisdictional competition readily acknowledge the dark sides of offshore jurisdictions that manifest in the form of money laundering, financial fraud, terrorism financing, and tax evasion.[104] But they counsel against "the welfare-enhancing baby from being thrown out with the money-laundering bathwater[.]"[105]

While insightful in many regards, these discussions are largely limited to the relative merits of firms opting out of "internal" corporate governance rules, along with regulatory compliance requirements in the deal making context.[106]

Largely overlooked are the collateral consequences that can be attributable to transnational corporate structuring, on the back-end litigation side. Offshore corporate migration, as I show in the next Part, impacts the enforceability of important domestic regulatory statutes.

II. WHY OFFSHORE CORPORATE MIGRATION MATTERS: THE LINK BETWEEN CORPORATE DOMICILE AND PUBLIC REGULATORY LAW

This Part uncovers how offshore corporate structuring may undermine the enforcement of federal regulatory statutes. It is worth noting up front that ascertaining the geographical reach of federal statutes generally does not directly concern constitutional law or international law. Rather, courts are often called upon to constructively assess the spatial reach of federal statutes, resulting in jurisprudence that largely comports with the boundaries set by the Constitution and

[104] Andrew P. Morriss, *Introduction*, I, 7, *in* OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION (Andrew P. Morriss ed., 2010).

[105] *Id.*

[106] Fleischer, *supra* note 60, at 230 (defining regulatory arbitrage as "the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment"). The "regulatory arbitrage" literature, for instance, identifies the sorts of regulatory gamesmanship that involve legal planning techniques used to avoid taxes and other regulatory costs. *Id.* at 229. In a seminal work, Ronald Gilson identified the important ways that private entities make decisions taking into consideration both regulatory cost and ordinary Coasian transactional cost. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984). In a more recent work, Victor Fleisher identified how regulatory arbitrage arise when private entities identify "gaps between legal form and economic substance." Fleischer, *supra* note 60, at 239. While some scholars have recognized the arbitrage opportunities that arise when multiple sovereigns are at play, the discussion is generally limited to costs internalized by corporate entities in the form of taxes and regulatory compliance costs. *Id.* at 246 ("The ability to choose one's planning of incorporation provides planning opportunities in the international context as well, of course. U.S. Companies sometimes consider re-incorporating in a tax-haven jurisdiction. Incorporating abroad allows multinationals to pay U.S. tax only on U.S.-source income and offer other opportunities to shelter U.S. income through transfer pricing, income stripping, and other techniques.") (internal citation omitted).

international law.[107] This is no easy task, given that statutes are generally "geoambiguous,"[108] giving only "cryptic clues as to their territorial scope."[109]

Although a variety of doctrines and procedural tools are available for federal judges to avoid adjudicating litigation involving foreign elements,[110] the presumption against extraterritoriality, a canon of statutory interpretation,[111] has resurfaced since 2010 as the Supreme Court's preferred method to adjudicate disputes laden with transnational fact pattern.[112] Labeled as "rigidly territorialist" by Carlos Vázquez,[113] the Court's recent jurisprudence is described by Hannah Buxbaum as a "continuing quest to identify categorical, territory-based rules" to govern "messy and often unpredictable patterns of transnational economic activity."[114] Section II.A provides an up to date primer on the geographical reach of federal statutes. Section II.B illustrates how this line of jurisprudence has produced rulings in the lower courts

[107] The spatial reach of federal law is theoretically constrained by the Constitution of the United States. Constitutional law issues may be triggered because individuals have rights under the Fifth Amendment. *See* Brilmayer & Norchi, *supra* note 31, at 1241. Boundaries set by international law can also be implicated, but only to the extent that Congress explicitly chooses to derogate from it. *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1072 (1985) ("[C]ourts have consistently held that Congress can violate treaties and customary international law at will.") (internal citation omitted). In the absence of express congressional intent, courts construe federal statutes to comport with the boundaries set by international law. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972). This is the *Charming Betsy* canon articulated in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[108] Jeffrey Meyer uses this term to describe federal statutes that "proscribe or regulate conduct but that remain silent about whether they apply to acts that occur outside of the United States." Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114 (2010).

[109] Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of A "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1818 (1992).

[110] Bookman, *supra* note 13, at 1081-82 (arguing that courts have developed increasingly strong tools for avoiding transnational litigation through personal jurisdiction, forum non conveniens, international comity, and the presumption against extraterritoriality). For instance, as Linda Silberman observes, the notable case of *Kiobel* could have been ruled on personal jurisdiction grounds. Linda J. Silberman, *Jurisdictional Imputation in* DaimlerChrysler AG v. Bauman*: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123, 123 (2013) ("[A] separate issue often overlooked in several of the ATS cases involving foreign country defendants is the question of adjudicatory (i.e. personal) jurisdiction. Indeed, the issue could have been presented in *Kiobel* itself[.]").

[111] Various iterations of the presumption canon are found throughout the past century. *See, e.g.*, Smith v. United States, 507 U.S. 197, 204 n.5 (1993) ("Congress generally legislates with domestic concerns in mind").

[112] As the *Morrison* Court reminds us, the presumption is a "canon of construction . . . rather than a limit upon Congress's power to legislate[.]" Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010) (internal quotation marks omitted).

[113] Vázquez, *supra* note 13, at 68.

[114] Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62, 62 (2016).

delimiting federal statutes from applying to "offshore" cases that are substantially connected to the United States.

A. *Extraterritoriality in the Post-*Morrison *World*

It all started with *Morrison v. National Australia Bank*,[115] involving three Australian investors who bought stocks in Australia's largest bank listed on the Australian Securities Exchange. The investors filed a suit in the Southern District of New York under the anti-fraud provision of the 1934 Securities and Exchange Act, alleging that the bank manipulated the financial models of an American mortgage-service company it purchased to make its business appear more valuable. The critical issue was whether Congress intended the Securities and Exchange Act to cover this sort of an action involving a company whose stock was traded on foreign exchanges.[116]

Justice Scalia, writing for the majority, held that civil actions for securities fraud under Section 10(b) of the Act cannot be based on a sale that took place on a foreign exchange. While the outcome of the case was relatively unremarkable,[117] *Morrison* is remarkable for rewriting the presumption against extraterritoriality canon into a two-step test.[118] Under this test, a court must first ask "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[119] If the statute does not, then the court determines whether the case involves a permissible "domestic application of the statute by looking to the statute's 'focus.'"[120] Under the second step, "if the

[115] *Morrison*, 561 U.S. at 249. One can say that it started earlier, when Justice Scalia penned a scathing dissent in the seminal case of *Hartford Fire Ins. Co. v. California* concerning the extraterritorial reach of the Sherman Act. *See* 509 U.S. 764, 800 (1993) (Scalia, J., dissenting). Interestingly, Justice Scalia in that opinion cites to the First Restatement on Conflicts and not the Second Restatement on Conflicts, at a time when the Second Restatement was the dominant paradigm subscribed to by mainstream jurists. *Id.* at 813, 821 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 34 (AM. LAW INST. 1934)). To conspiracy theorists, this may suggest that Justice Scalia was all along a traditional territorialist, in sharp contrast to modern writers.

[116] *Morrison*, 561 U.S. at 247-49.

[117] The case involved the fairly controversial topic of applying U.S. securities law to the so-called "f-cubed" transactions, where foreign shareholders purchase stock of a foreign issuer on a foreign exchange. The Court was merely affirming the Second Circuit's holding, albeit over-turning the lower court's longstanding doctrinal test. For an excellent discussion on "f-cubed" securities litigation, see Elizabeth Cosenza, *Paradise Lost: §10(b) after* Morrison v National Australia Bank, 11 CHI. J. INT'L L. 343, 344-45 (2010).

[118] For a general critique of how the *Morrison* Court re-shaped the presumption against extraterritoriality, see Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011) [hereinafter Brilmayer, New Extraterritoriality].

[119] *Morrison*, 561 U.S. at 248.

[120] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (quoting *Morrison*, 561 U.S. at 249).

conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[121] Employing this test, the *Morrison* Court concluded that the Exchange Act did not apply to the facts at hand because it applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[122]

Since *Morrison*, the Supreme Court has invoked the two-step presumption at a rapid pace, by historical standards.[123] In *Kiobel v. Royal Dutch Petroleum*, decided in 2013, the Court invoked the presumption to hold that alleged human rights violations committed by the Royal Dutch Shell Company in the Ogoni region of Nigeria could not be brought under the Alien Tort Statute because "all the relevant conduct" regarding those violations "took place outside the United States."[124] In its most recent opinion on the topic, *RJR Nabisco, Inc. v. European Community*, the Court extended the presumption to a suit involving American corporations that allegedly directed a racketeering activity from the United States to launder drug-trafficking money through cigarette purchases, resulting in harm to European state-owned cigarette businesses.[125] The Court declined to apply the RICO Act to the facts of the case, reasoning that private litigants bringing a RICO claim must establish "domestic injury" and not "domestic conduct."[126]

It is worth noting here that the Supreme Court's "focus" test developed in *Morrison* mirrors in many respects the interest analysis method regularly deployed by state court judges in domestic choice of law cases to determine which state's law to apply in multistate disputes.[127] Brainerd Currie, credited with developing the interest analysis method in a series of law review articles in the 1950s and the

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[121] *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

[122] *Morrison*, 561 U.S. at 249.

[123] Maggie Gardner, RJR Nabisco *and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 136 (2016) ("[T]he presumption against extraterritoriality fell into disuse after the 1940s. The Restatement (Third) of Foreign Relations Law, published in 1987, did not even bother to include it.") (internal citation omitted).

[124] 133 S. Ct. at 1670. For an introduction to the scope of the Alien Tort Statute, see William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT'L L. 51, 57-61 (2016).

[125] *RJR Nabisco, Inc.*, 136 S. Ct. 2098.

[126] *Id.* at 2111.

[127] Conflict of laws is far from a crisp monolithic theory that can be imported blindly to the federal extraterritoriality context. It is an embodiment of decades of "intellectual wars" and "revolutions," in part driven by new factual realities that rendered certain conceptions of the law to be practically infeasible and intellectually rotten. *See* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006). Moreover, there are important theoretical and substantive differences between extraterritoriality of state law and federal law. *See* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987). I am in no way suggesting that the two approaches should be collapsed in general.

1960s,[128] instructed courts to "inquire what policy can reasonably be attributed to the legislature, and how it can best be effectuated by the courts in their handling of mixed cases."[129]

Both the "focus" test and the "interest analysis" method thus instruct courts to identify the substantive policy of a statute to ascertain whether a jurisdiction has an interest in having its law applied to a particular case with multi-jurisdictional element.[130] Fundamental to this line of inquiry is ascertaining whether the policies behind the particular law at issue would be promoted by the application of that law to a particular dispute.[131]

The shared methodology exposes the new federal extraterritoriality test to the well-known problems that plague the interest analysis approach in domestic choice of law cases.[132] For one, instructing courts to decipher the policy behind a statute is often unhelpful because it is almost never clear whether a particular statute's concern refers to "domestic conduct, domestic effect, or any discernable domestic

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[128] Most of these are compiled in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

[129] Brainerd Currie, *Married Women's Contracts: A Study of Conflict of Laws Methods*, 25 U. CHI. L. REV. 227, 233 (1958). This was an innovative inquiry at the time, because the traditional account, influenced by the teachings of England and continental Europe, "ignores the content of laws" and instead uses "territorial rule of scope to eliminate conflicts by allocating authority to a single territorially-appropriate state." KERMIT ROOSEVELT III, CONFLICT OF LAWS 51 (2015).

[130] Despite several other theoretical considerations that separate the two, both methods share what others have recognized as the scope analysis: that is, the reach of a particular jurisdiction's laws. *See, e.g.*, Donald Earl Childress III, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT'L L. 361, 365 (2017) ("[T]he federal extraterritoriality approach is basically an analysis of the scope of federal law.").

[131] As Herma Kay explains, the interest analysis method was radically different than the traditional method developed in Europe that focused on raw connecting factor, rather than judges attempting to decipher the policy behind a particular statute. *See* Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, but Winning the War*, 37 WILLAMETTE L. REV. 123, 124-25 (2001) ("In the field known in England and on the continent as 'private international law,' . . . [t]he recommended method was to identify the particular jurisdiction with the right to decide the choice-of-law question. . . . The judge was supposed to decide only which jurisdiction's law should apply, not which law should apply. . . . Indeed, as an initial matter, the content of the purportedly conflicting laws was irrelevant.").

[132] Lea Brilmayer is the leading authority exposing some of the theoretical and methodological flaws embedded in the interest analysis method. *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 43-106 (1991); Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second look at the Restatement 2D of Conflicts*, 2015 U. ILL. L. REV. 1969, 1976-79; Lea Brilmayer, *Legitimate Interests in Multi-State Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1321-22 (1981); Brilmayer, Legislative Intent, *supra* note 25; Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985).

connection."[133] Statutes, often written in majestically general terms,[134] are also difficult if not impossible to discern because many are laden with multiple (and some conflicting) goals.[135] The text of the statute typically does little to alleviate this problem. As Lea Brilmayer assessed in an infamous piece critiquing the interest analysis approach, "in the vast majority of cases, legislatures have no actual intent on territorial reach[.]"[136] The difficulty in applying the focus test, which has been described as "entirely circular",[137] is summed up by a federal judge in Pennsylvania adjudicating a civil RICO claim after *Morrison*: "Reflexive reference to the term 'focus' is unhelpful, as a statute could be described as concentrated on the activities it criminalizes . . . or on the entity or person it seeks to protect, or on a blend of both, and all three options may be accurate depending on context."[138]

The practical consequence of the Supreme Court's new approach, however, is less confusing: it heightens the burden for plaintiffs attempting to bring private suit with a transnational fact pattern.[139] Importantly, the first step virtually prohibits a federal judge from finding Congressional intent to apply statutes outside of the U.S.

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[133] Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 15 (2014).

[134] ROOSEVELT III, *supra* note 129, at 46 ("[L]egislatures write in majestic generalities, but they do not intend universal scope[.]").

[135] Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 680 (2012) ("It is unreasonable to expect Congress to anticipate all interpretive questions [about a statute] that may present themselves in the future."); *see also* ROOSEVELT III, *supra* note 129, at 57 ("It is hard to be confident about exactly what the legislature aimed to achieve, and in fact legislatures probably often have multiple and perhaps conflicting goals.").

[136] Brilmayer, Legislative Intent, *supra* note 25, at 393; *see also* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 ILL. L. REV. 1847, 1857 ("[S]tatutes that expressly declare their intended territorial reach are the exception rather than the rule.").

[137] Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 345-56 (2014) ("[T]he test [is] entirely circular because the purpose of asking whether the claim involves extraterritoriality is to decide whether to invoke the presumption as a means to determine Congress's intent. The circulatory of the statutory focus test renders the presumption against extraterritoriality useless except in easy cases in which none of the challenged conduct or its effect occurs in the United States.").

[138] *In re* Le-Nature's, Inc., No. 9-1445, 2011 WL 2112533, at *2 n.3 (W.D. Pa. May 26, 2011).

[139] *See* Bookman, *supra* note 13, at 1097-99; Florey, *supra* note 43, at 542 (describing the *Morrison* opinion as adhering to an old-fashioned and formalistic view of territory); Patrick J. Borchers, *How "International" Should A Third Conflicts Restatement Be in Tort and Contract?*, 27 DUKE J. COMP. & INT'L L. 461, 461 (2017) (describing the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act as being construed by the Supreme Court "in implausibly narrow fashions to limit their impact abroad"); Franklin A. Gevurtz, *Building a Wall Against Private Actions for Overseas Injuries: The Impact of* RJR Nabisco v. European Community, 23 U.C. DAVIS J. INT'L L. & POL'Y 1, 2 (2016) (describing *Nabisco* as raising "the presumption against extraterritoriality into a substantially greater barrier against those seeking relief under federal law for injuries suffered abroad"); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673 (2011).

territory absent express instructions—something that rarely exists in the world of federal statutes.[140] While the second step leaves the door open, an attempt to decipher the "focus" of a particular statute inevitably serves as a screening mechanism eliminating the type of connecting factors that could overcome the presumption against extraterritoriality. Thus, for instance, in *Nabisco*, the overwhelming facts connecting the case to the United States—"[a]ll defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States"[141]—were insufficient to trigger the RICO statute, because the "focus" of the statute was determined by the majority of the Justices to be regulating "domestic injury" and not "domestic conduct."[142] And in *Morrison*, even though the relevant fraudulent conduct took place in the United States, this was insufficient because Congressional focus was not to punish deceptive conduct alone, but "deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'"[143]

Below, I illustrate the impact of this line of jurisprudence on the offshore context by examining recent cases involving the extraterritorial application of the U.S. Bankruptcy Code, the RICO Act, and the Exchange Act.

B. Offshore Application

1. "Domestic" Fraudulent Transfers under the U.S. Bankruptcy Code

Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC is one of the dozens of high stakes bankruptcy litigation stemming from the infamous Madoff Ponzi scheme.[144] Madoff, a former chairman of the NASDAQ, pleaded guilty to 11 counts of federal crimes in 2009 after running a $50 billion Ponzi scheme through his fund, Bernard L. Madoff Investment Securities

[140] Brilmayer, New Extraterritoriality, *supra* note 118, at 655 (assessing that the first step instructs "lower courts to turn a deaf ear to indications of congressional intent any subtler than the proverbial meat axe"). This much is clear from the Supreme Court's blunt admission in *Nabisco* that the new extraterritoriality test does not actually concern what Congress would want, but whether Congress explicitly gave indication on a statute's geographic scope. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) ("The question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so.") (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 261 (2010)).

[141] *RJR Nabisco, Inc.*, 136 S. Ct. at 2114 (Ginsburg, J., dissenting).

[142] *RJR Nabisco, Inc.*, 136 S. Ct. at 2111 (majority opinion).

[143] *Morrison*, 561 U.S. at 266 (quoting 15 U.S.C. § 78j(b) (2016)).

[144] Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222, 225 (S.D.N.Y. 2014).

(BLMIS).[145] Madoff did not actually engage in any securities transactions on behalf of his customers, but "sent them bogus customer statements and trade confirmations showing fictitious trading activity and profits."[146] Investors in this scheme included both domestic and foreign investors that invested in Madoff's fund through feeder funds formed in the British Virgin Islands and the Cayman Islands.[147] Prior to the collapse of Madoff's fund, the feeder funds withdrew proceeds from BLMIS's commingled bank account that included other customers' investments along with "fake" profits and distributed them to "their customers, managers, and the like[.]"[148] Following the commencement of the BLMIS's liquidation, the court-appointed trustee sued the feeder funds, as well as the investors who invested in BLMIS through the feeder funds, in order to recover the transferred funds.

The relevant laws here are fraudulent transfer laws,[149] codified in the U.S. Bankruptcy Code.[150] The Code allows the trustee to recover—or to use the statute's term, "avoid"—transfers made that were fraudulently transferred, to spread the loss among defrauded creditors. In a typical bankruptcy proceeding, a trustee is appointed to oversee a fair distribution in accordance with the priority rules.[151] The defendants in *Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, who were recipients of the proceeds from the feeder funds, moved to dismiss, arguing that the Bankruptcy Code

[145] Robert Frank, Amir Efrati, Aaron Lucchetti & Chad Bray, *Madoff Jailed After Admitting Epic Scam*, WALL ST. J. (Mar. 13, 2009), https://www.wsj.com/articles/SB123685693449906551.

[146] Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. AP 08-01789 (SMB), 2016 WL 6900689, at *2 (Bankr. S.D.N.Y. Nov. 22, 2016).

[147] *Sec. Inv'r Prot. Corp.*, 513 B.R. at 225.

[148] *Id.*

[149] Fraudulent transfer laws trace their origin to a legislation passed in 1571 in England making "illegal and void any transfer made for the purpose of hindering, delaying, or defrauding creditors." Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 829 (1985). This statute, commonly known as the Statute of 13 Elizabeth, was designed to curb what was thought to be a widespread practice of debtors avoiding creditors through entering and living in sanctuaries—including interior of a church and certain precincts defined by custom or royal grant—unreachable by the King's writ. *Id.*

[150] Section 548(a)(1) permits avoidance of fraudulent transfers that were executed "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." 11 U.S.C. § 548(a)(1)(a) (2012). Section 550(a) permits the trustee to recover the transfer avoided under Section 548. *See* 11 U.S.C. § 550(a) (2012).

[151] The particular case at hand involved the trustee proceeding pursuant to the Securities Investor Protection Act of 1970 (SIPA). *See* 15 U.S.C. § 78fff(b) (2012). SIPA "merely engrafts special features onto the familiar framework of a liquidation proceeding under Chapter 7 of the Bankruptcy Code . . . to address the concerns peculiar to the orderly liquidation of a brokerage." Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 212 (2d Cir. 2014). An ordinary claw back action involving a Ponzi scheme is not particularly difficult, given that transfers in connection with a Ponzi schemes are presumed to be fraudulent transfers. *See, e.g.*, Drenis v. Haligiannis, 452 F. Supp. 2d 418, 429 (S.D.N.Y. 2006) ("[T]he defrauding defendants—who are alleged elsewhere in the complaint to be perpetrators of a Ponzi scheme. In such cases, courts have found that the debtor's intent to hinder, delay or defraud is presumed to be established.").

"does not apply extraterritorially and therefore does not reach subsequent transfers made abroad by one foreign entity to another."[152]

In determining whether the transfer occurred "extraterritorially," Judge Rakoff assessed that the "focus" of the relevant sections of the Bankruptcy Code was on the "property transferred [and] the fact of its transfer, not the debtor."[153] Under this analysis, the transfer at issue was extraterritorial because "the relevant transfers and transferees are predominantly foreign: foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees."[154]

Importantly, Judge Rakoff's analysis elevates the domicile of the feeder funds as the central factual input of the extraterritoriality analysis.[155] This is apparent as the court's analysis necessarily downplays the importance of the fact that "the chain of transfers originated with Madoff Securities in New York[.]"[156] Judge Rakoff's "focus" also glances over the fact that many of the feeder funds were controlled and operated from the funds' related entities located in the United States. For instance, one major feeder fund, Fairfield Cayman, maintained its principal place of business in New York, operated out of a parent entity's New York headquarters, and "never had any employees or an office in the Cayman Islands[.]"[157] The decision's narrow (and peculiar) construction of the Bankruptcy Code's geographic reach is perhaps best illustrated in an example provided by Ed Morrison in his critique of the decision: "If Madoff wires funds from his New York account to London-based investors, the Trustee can bring suit against those investors. But if Madoff carries a briefcase full of cash to London and then hands the cash to his investors, the Trustee apparently cannot bring suit because the cash handoff was a 'purely foreign transfer'"[158]

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[152] *Sec. Inv'r Prot. Corp.*, 513 B.R. at 226.

[153] *Id*. at 227.

[154] *Id*. Rather than ruling on each claim before him, Judge Rakoff remanded the cases for the bankruptcy judge to decide each of the trustee's avoidance claims within the parameter's he set forth.

[155] It is important to remember that feeder funds themselves exist principally as a tax avoidance tool. Recall that foreign investors typically invest in U.S.-managed funds not directly, but through "feeder funds" formed in offshore jurisdictions for tax purposes. *See supra* subsection I.B.1. Absent this corporate structure, a foreign creditor withdrawing from a domestic fund would likely fall within the reach of the U.S. bankruptcy law. Arguably these foreign customers would have a "good faith" defense on grounds that they could not expect their funds to be invested in a U.S.-based entity. *See* Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 268, 283 (2014) [hereinafter Morrison, Extraterritorial Avoidance]; *see also* 11 U.S.C. §§ 548(c), 550(b) (2012) (offering defenses to a transferee "that takes for value" and "in good faith"). But this is a separate question from the geographical reach of U.S. bankruptcy law.

[156] *Sec. Inv'r Prot. Corp.*, 513 B.R. at 228.

[157] Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, No. AP 08-01789 (SMB), 2016 WL 6900689, at *31 (Bankr. S.D.N.Y. Nov. 22, 2016).

[158] Morrison, Extraterritorial Avoidance, *supra* note 155, at 270 (quoting *In re* Madoff Securities, 513 B.R. at 232).

2. *"Domestic" Injuries under the RICO Act*

The impact of the Supreme Court's recent decision in *Nabisco* has already made shockwaves of confusion in the lower courts adjudicating civil RICO cases.[159] The recent case of *Absolute Activist Value Master Fund Limited v. Devine* illustrates how courts have imputed the location of the injury—the "focus" of the RICO statute under *Nabisco*—based on the domicile of corporate entities.[160]

In *Absolute Activist Value Master Fund Limited v. Devine*, eight hedge funds—all formed under the laws of the Cayman Islands—sued Susan Devine, a long-term resident of Naples, Florida. Devine was a former wife of Florian Homm, a chief investment officer and investment manager for mutual funds who allegedly caused more than $200 million in losses by inflating the prices of virtually worthless U.S. microcap companies.[161] After learning that the scheme was at risk of being publicly disclosed, Devine allegedly formed a criminal enterprise with Homm to conceal and transfer proceeds from the scheme. This elaborate scheme encompassed: "a strategic divorce; the creation of a network of entities in far-flung locales, including known bank secrecy havens; the use of accounts for which the Homm children were the nominal beneficiaries to shield assets; the fabrication of records; the use of aliases; difficult-to-trace transactions in cash, gold, and fine art; and innumerable bank transfers[.]"[162]

While the complaint alleged that the money laundering scheme was "directed, controlled, and participated" by Devine in Florida, the court dismissed the RICO claim reasoning that any alleged economic injuries were suffered by the plaintiffs in "the only location where the plaintiffs were located—in the Cayman Islands."[163] The court reached this decision because the "focus" of RICO, under the Supreme Court's *Nabisco* decision, is the "geographic location of the injury to plaintiffs, not the location of a defendant's wrongful acts."[164]

It is important to note here that the court's analysis neglects to consider the source of the funds: as alleged in the complaint, the fund operated by Homm

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[159] This much was predicted by Justice Alito's majority opinion in *Nabisco*. As the *Nabisco* Court explains, the application of the rule that a civil RICO plaintiff "allege and prove a domestic injury to business or property . . . will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'" RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2111 (2016).

[160] Absolute Activist Value Master Fund Ltd. v. Devine, No. 215-cv-328, 2017 WL 519066 (M.D. Fla. Feb. 8, 2017).

[161] Complaint ¶ 2, Absolute Activist Value Master Fund Ltd. v. Devine, 2017 WL 519066 (M.D. Fla. Feb. 8, 2017) (No. 15-00328).

[162] *Id.* ¶ 3.

[163] *Devine*, 2017 WL 519066, at *20.

[164] *Id.*

invested "on behalf of hundreds of investors in the United States and around the world."[165] Moreover, plaintiffs had alleged that Devine directed the scheme transferring wrongfully obtained proceeds "while residing in Naples, Florida."[166] Whether these facts constitute a sufficient nexus to the United States and whether the alleged actions amounted to a RICO violation are separate questions. What stands out is the formalistic line drawn by the court based on the domicile of the fund, turning a blind eye to the significant American connection to the case.

3. *"Domestic" Securities under the Exchange Act*

In *Morrison*, the Supreme Court limited the application of section 10(b) to either (i) "the purchase or sale of a security listed on an American stock exchange," or (ii) "the purchase or sale of any other security in the United States."[167] The *Morrison* Court provided little guidance on what constitutes a domestic purchase or sale for a security not listed on an exchange like the NASDAQ or the New York Stock Exchange.[168] *Morrison* simply held that the provision applies to non-exchange based transactions when "the purchase or sale is made in the United States."[169]

Cascade Fund, LLP v. Absolute Capital Management illustrates how the offshore fund structure aids securities transactions with fairly substantial connection to the United States to evade U.S. securities law. In *Cascade*, a Colorado-based company invested in Absolute Capital Management (ACM), a fund organized and registered under the laws of the Cayman Islands. ACM contended that *Morrison* precluded the application of section 10(b) claims because "the funds are not traded on any domestic stock exchange and because the transaction . . . occurred in the Cayman Islands, not the United States."[170] Cascade alleged four facts to establish that the transaction was plausibly a domestic transaction: "(i) the Offering Memoranda and other investment materials were disseminated to Cascade in the United States; (ii) . . . ACM executives traveled to the United States to solicit American investors; (iii) Cascade made its decision to invest while in the United States; and (iv) the money for the purchase was wired to a bank in New York."[171]

The court dismissed the case at a motion to dismiss stage, reading *Morrison* as making "clear that the test of §10(b)'s reach is not dependent on the fact that

[165] Complaint ¶ 9, Absolute Activist Value Master Fund Ltd. v. Devine, 2017 WL 519066 (M.D. Fla. Feb. 8, 2017) (No. 15-00328).

[166] *Id.* ¶ 145.

[167] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 273 (2010).

[168] Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012).

[169] *Morrison*, 561 U.S. at 269-70.

[170] Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., No. 08-CV-01381-MSK-CBS, 2011 WL 1211511, at *5 (D. Colo. Mar. 31, 2011).

[171] *Id.* at *7.

domestic investors in foreign securities were harmed by fraud."[172] Interestingly, the court focused on the language of the Subscription Agreement (the contract at issue), which made it "clear that simply sending money to New York was not sufficient to complete the transaction."[173] Thus, the court assessed that the transaction could not have occurred in the United States because "the transaction was not completed until ACM finally accepted an application—presumably in its Cayman Islands offices."[174]

Cascade Fund is indicative of post-*Morrison* jurisprudence that has elevated the domicile of corporate entities as the basis to impute location to financial transactions that often take place electronically, or involve conduct in multiple jurisdictions.[175] This framework, of course, is bound to unravel when judges are forced to impute geographical location to transactions that refuse to be captured in traditional notions of space and time.[176] It is no surprise, then, that the place of corporate incorporation—a tangible geographical marker—becomes an important factual input to impute location to financial transactions that are largely un-territorial.[177]

* * *

To recap, offshore financial havens have created virtual spaces where the juridical status of corporate entities plays a significant role in delimiting the application of federal statutes. Perhaps more importantly, the "focus" test developed by the *Morrison* Court invites endless permutations of loopholes that allow private entities to avoid the application of federal regulatory statutes. In the securities

[172] *Id.* at *5.

[173] *Id.* at *7.

[174] *Id.*

[175] As Buxbaum explains, "many investment transactions . . . touches with multiple countries or are executed by electronic or other means to which it is difficult to assign a location at all." Hannah L. Buxbaum, *Remedies for Foreign Investors under U.S. Federal Securities Law*, 75 LAW & CONTEMP. PROBS. 161, 167-68 (2012) [hereinafter Buxbaum, Remedies].

[176] As explained by a group of law professors in a letter to the SEC, "[m]arkets are moving to a point where the 'site' of a trade is happenstance," such that there is little "connection between the place of trade and the injury." Comment Letter from Forty-Two Law Professors to Elizabeth M. Murphy, Sec'y, SEC, on Study on Extraterritorial Private Rights of Action, No. 34-63174, at 7 (Feb. 18, 2011), http://www.sec.gov/comments/4-617/4617-28.pdf. This debate is playing out in the federal courts of appeals that have struggled to square *Morrison*'s doctrinal framework as related to ascertaining the geographical locus of purchase or sale. *See, e.g.*, United States v. Georgiou, 777 F.3d 125, 133 (3d Cir. 2015); ParkCentral Global Hub Ltd. v. Porsche Automobile Holdings SE, 763 F.3d 198 (2d Cir. 2014).

[177] Consider the case of *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1340-41 (S.D. Fla. 2010). Apparently taking *Morrison*'s central teaching as counseling against "many foreign transactions to United States securities law[,]" the court observed that "[t]he funds at issue in this case are registered under the laws of the Bahamas[.]" *Id.* at 1340-41. The court, therefore, viewed applying U.S. securities fraud claim as entailing "the type of interference with foreign securities regulation that *Morrison* sought to avoid." *Id.* at 1317.

regulation context, the new jurisprudence allows private entities, with essentially a well-drafted contract and incorporation paperwork, to opt out of section 10(b) even while soliciting American investors within the territory of the United States.[178] And consider the implications of Judge Rakoff's Madoff ruling. As Ed Morrison explains, under the Madoff decision, "[a] transfer can be immunized from recovery simply by interposing a foreign-based transferee between the debtor and the ultimate foreign beneficiary."[179] This is not mere academic speculation. As Judge Scheindlin forewarned in a pre-*Morrison* case: "a creditor—be it foreign or domestic—who wished to characterize a transfer as extraterritorial could simply arrange to have the transfer made overseas, a result made all too easy in the age of the multinational company and information superhighway."[180] The next Part takes a step back and interrogates the purported reasons that underlie this line of jurisprudence.

III. CORPORATE DOMICILE AND TERRITORIAL SOVEREIGNTY

This Part assesses whether offshore financial havens can plausibly claim to regulate the "external affairs" of corporate entities domiciled offshore. Section III.A introduces readers to the traditional and modern conceptions of territorial sovereignty and shows the implausibility of a jurisdiction asserting an authority to legislate based on corporate domicile alone. Viewed in this light, the recent extraterritoriality jurisprudence discussed in Part II represents domestic regulatory law ceding to privately curated juridical rules, bootstrapped in the myth of offshore territorial sovereignty. Section III.B raises several important considerations challenging the wisdom of jurisdictional competition and regulatory arbitrage facilitated by domestic regulatory statutes that are territorially-tethered in scope. This section, importantly, highlights that territory-oriented jurisprudence embraced by recent Supreme Court opinions may undermine important policy goals embedded in domestic regulatory statutes.

A. Territorial Sovereignty under Domestic and International Law

The presumption against extraterritoriality is a method of statutory interpretation deployed to accomplish two goals. This includes, first, effectuating Congress's general practice of legislating with "domestic concerns in mind,"[181] and second,

[178] This should give some reason for concern. As Hannah Buxbaum explains, the territorialist jurisprudence in the securities regulation context enables transactions that are "not only manipulable but can be non-transparent to the other party." Buxbaum, Remedies, *supra* note 175, at 173.

[179] Morrison, Extraterritorial Avoidance, *supra* note 155, at 269-70.

[180] *In re* Maxwell Commc'n Corp. plc, 186 B.R. 807, 816 (S.D.N.Y. 1995), *aff'd sub nom. In re* Maxwell Commc'n Corp. plc by Homan, 93 F.3d 1036 (2d Cir. 1996).

[181] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (internal quotation marks and citation omitted).

avoiding "international discord that can result when U.S. law is applied to conduct in foreign countries."[182] While the Court described this "international discord" rationale as the "most notabl[e]"[183] reason for employing the presumption in *Nabisco*, the Court has not stayed consistent on this point. In *Morrison*, for instance, the Court stated that the presumption applies "regardless of whether there is a risk of conflict between the American statute and a foreign law[,]"[184] leading an early commentator to conclude that the international comity rationale embodied in the presumption was dead.[185] This did not turn out to be the case, as *Nabisco* in 2016 reaffirmed the international discord rationale as central to the presumption.

Regardless of whether comity concerns are already folded into the presumption, it is worth reviewing the theoretical building blocks underlying any given nation state's authority to legislate in the first place. This is important, because where there is no possible foreign sovereign interest attributable to a particular transnational case, the rationale underlying the presumption (and the related concept of comity) becomes moot, resulting in non-application of federal law in a vast range of transnational cases where application would advance U.S. interest without clashing with foreign law.[186] Moreover, a case substantially connected to the United States would presumably involve "domestic concerns" that federal statutes are designed for.[187] Below, I review the concept of territorial sovereignty as it relates to a sovereign's authority to legislate, and apply the principle to the case of offshore financial havens.

1. *Traditional Conceptions of Territorial Sovereignty*

Territorial sovereignty is a concept that traces its intellectual origin to the historical legacy of the Westphalian sovereign state.[188] Nation states, in the aftermaths of the Peace of Westphalia in 1648, were principally defined by territorial

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[182] *Id.*

[183] *Id.*

[184] Morrison, Extraterritorial Avoidance, *supra* note 155, at 255.

[185] *See, e.g.*, William S. Dodge, Morrison*'s Effects Test*, 40 SW. L. REV. 687, 689 (2012) [hereinafter Dodge, Effects Test] ("The first justification became difficult to maintain after the Court applied the presumption in situations presenting no risk of conflict with foreign law, and *Morrison* officially jettisoned it. Thus, the presumption now rests solely 'on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.'") (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010)).

[186] Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 215-17 [hereinafter Kramer, Vestiges].

[187] *See, e.g.*, Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

[188] Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508 (2005) ("The importance of place to legal rules and protections—the belief that law derives from land—has deep historical roots. Defining law in spatial terms accords with the traditional conception of the Westphalian sovereign state.").

borders under the premise that the world was divided into separate, equal, and independent states.[189] Influenced by the work of seventeenth century Dutch jurist Ulrich Huber,[190] Justice Joseph Story is credited with transplanting this concept of territoriality to the American legal discourse. In a celebrated treatise, *Commentaries on the Conflict of Laws*, published in 1834, Story explained that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[191]

Because statehood was articulated in terms of a particular parcel of territory, "jurisdiction, in the sense of a sovereign's authority over persons or events, was also referenced to their location within that territory."[192] This historic legacy of the Westphalian state informed the Supreme Court's early extraterritoriality jurisprudence in federal customs and piracy laws disputes in the early nineteenth century.[193] The presumption against extraterritoriality made its modern appearance as a canon of statutory interpretation in U.S. Supreme Court docket in the early twentieth century.[194] In the seminal case of *American Banana Co. v. United Fruit Co.*,[195] Justice Oliver Wendell Holmes famously noted that "all legislation is *prima facie* territorial[,]" declining to extend the reach of the Sherman Act to activities in Colombia.[196]

Strict territorialism was the principle that also influenced the doctrinal development of a wide body of law at the time, including judicial jurisdiction and conflict of laws.[197] Judicial jurisdiction, or the sovereign's authority over persons or

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[189] It is for this reason that statehood is often conceptualized as an entity monopolizing the use of legitimate authority in a particular territory. Territorial sovereignty, in both law and political science, is generally understood as a nation exercising principal means of authority within a given territory. *See* Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL L. STUD. 475, 476 (1998).

[190] Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 259 ("Story borrowed from Huber the idea of the exclusivity of sovereign authority.").

[191] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (Arno Press ed. 1972) (1834).

[192] *See* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 632 (2009) [hereinafter Buxbaum, Territoriality].

[193] *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630-32 (1818).

[194] *See* Dodge, Effects Test, *supra* note 185, at 687. Of course, the presumption against extraterritoriality traces its doctrinal roots to the *Charming Betsy* canon, which teaches that statutes should be construed not to violate international law. *See* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE SUPREME COURT: CONTINUITY AND CHANGE 7, 38 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

[195] 213 U.S. 347, 356-57 (1909).

[196] *Id.* at 357. The opinion reflects strict territorialism that enjoyed its heyday around the time. *See id.* at 356 ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

[197] Allgeyer v. Louisiana, 165 U.S. 578, 588 (1897) (rejecting application of Louisiana law to a contract "made and to be performed within the State of New York"). Of course, it is important to

events, for instance, could be determined by ascertaining the location of the persons or events within that territory.[198] The familiar case of *Pennoyer v. Neff* held that territorial presence was a precondition for a court to exercise personal jurisdiction.[199] Joseph Beale has had the most significant and enduring impact as the intellectual leader of the traditional "territorial" thought in conflict of laws. To Beale, law had to "apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."[200] This is the famous "vested" rights theory, prominently codified in the First Restatement of Conflict of Laws. For instance, the Restatement primarily determined applicable tort law based on "the last event necessary to make an actor liable for an alleged tort takes place,"[201] while determining applicable contract law principally based on where the contract was accepted.[202]

2. *Modern Conceptions of Territorial Sovereignty*

A comprehensive theory in line with strict territorialism began to crack in the early twentieth century with the acceleration of cross-border activities that forced territorially-tethered laws to produce results that were "undeniably arbitrary and verged on the bizarre."[203] The rise of legal realism, in particular, exposed the formalistic account as intellectually rotten and practically infeasible, setting up an intellectual vacuum for modern conceptions of territorial sovereignty to take shape.[204]

Against this backdrop, strictly territorial rules were gradually relaxed over the course of the twentieth century,[205] in favor of more flexible conceptions of territoriality. Various modern strands of territorial sovereignty rejected categorical

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recognize that "strict territorialism" was not actually as dogmatically territorialist as some have described it. *American Banana*, which is taken as the hornbook example of territorialism, for instance, acknowledges exceptions to strict territorialism. *Am. Banana Co.*, 213 U.S. 347, 355-56 (1909) (Holmes, J.) ("No doubt in regions subject to no sovereign . . . may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."); *see also* Kramer, Vestiges, *supra* note 186, at 189 ("[D]espite the unqualified language used by Story and others, the territorial principle was never followed universally.").

[198] Buxbaum, Territoriality, *supra* note 192, at 632 ("Statehood is articulated by reference to a particular geographic territory; jurisdiction, in the sense of a sovereign's authority over persons or events, by reference to their location within that territory.").

[199] Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

[200] JOSEPH BEALE, CONFLICT OF LAWS 46 (1935); *see also* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455 (1999) ("Law, for Beale, was fundamentally territorial, supreme within a jurisdiction but generally powerless outside it.").

[201] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934).

[202] ROOSEVELT III, *supra* note 129, at 10.

[203] Roosevelt III, *supra* note 25, at 2458.

[204] Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1282-84 (1989).

[205] Buxbaum, Territoriality, *supra* note 192, at 636; Dodge, International Comity, *supra* note 21, at 2092.

rules derived solely based on raw territorial contact and embraced a more flexible approach taking into account the location of the harm.[206]

Strict territoriality's demise in judicial jurisdiction is a story familiar to scholars with no particular love for personal jurisdiction. The Supreme Court in 1945 relaxed the personal jurisdiction standard to a flexible "fair play and substantial justice" test in *International Shoe v. Washington*,[207] laying the theoretical groundwork for *Shaffer v. Heitner* to formally overturn *Pennoyer v. Neff*.[208]

A revolution swept across the field of conflict of laws as well, accommodating a theory of "state interest" that could exist outside of strict territorial connection between the state and the individual. Moving away from the First Restatement's teachings, "modern" conflicts scholars embraced "a flexible, case-by-case approach to choice-of-law problems that focused on state interests[.]"[209]

Various strands of federal extraterritoriality doctrines developed in the middle of the twentieth century similarly repudiated raw territorial contact as the sole basis to determine the reach of law. The movement had already started in 1927, when the Supreme Court in *United States v. Sisal Sales Corp.* distinguished *American Banana* to a case with almost identical facts.[210] A full-scale abandonment can be traced to the Second Circuit's 1945 decision in *Alcoa*, where Judge Learned Hand dispensed with the *American Banana* test and, in its place, articulated an "effects" test: conducts occurring outside the territory of the United States were prohibited by the Sherman Act "if they were intended to affect imports and did affect them."[211] This more flexible conception of territoriality is reflected in the influential Restatement (Third) of Foreign Relations Law's five bases for the exercise of legislative jurisdiction:

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[206] William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 124-27 (1998).

[207] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that a state court can exercise personal jurisdiction over a defendant if he has "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"). For a commentary reflecting on the impact of *International Shoe*, see Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 758 (1995).

[208] Shaffer v. Heitner, 95 U.S. 714 (1878); *see also* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 62-79 (1978) (explaining the doctrinal shift leading up to *Shaffer*).

[209] Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 251 (2007) (reviewing SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006)).

[210] 274 U.S. 268, 276 (1927).

[211] United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416, 449 (2d Cir. 1945); *see also id.* at 443 ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.").

"territorial, national, protective, passive personality, and universal jurisdiction."[212] It is under this rubric in the next section that I evaluate a possible territorial sovereignty claim that can be raised by an offshore financial haven.

B. *Could Corporate Domicile Trigger an Authority to Legislate?*

Of the five bases to exercise legislative jurisdiction recognized by the Restatement (Third) of Foreign Relations Law, only two potentially implicate the issue at hand here: national and territorial.[213]

Territorial theory allows a nation state to exercise jurisdiction over any conduct committed in whole or in part within the border, and any action taking place outside the territory that has a local impact.[214] While the offshore financial haven's territorial contact with a corporate entity—ranging from the physical filing of the incorporation documents or maintaining a mailbox within the physical territory of the jurisdiction—may provide a possible claim under this theory, this argument is unavailing because the relevant entity's contact with the jurisdiction is largely metaphysical, in the sense that the conduct that may give rise to a legal claim does not physically take place in offshore jurisdictions. While the territorial theory recognizes a right to legislate based on the effects felt within the jurisdiction,[215] this doctrine also does little work here, given that corporate domicile is irrelevant for tracking the location of potential harm arising out of corporate activities.[216] For instance, an American retiree that invested in a fraudulent investment package sold by a Bahamas fund managed by investment managers in San Francisco will presumably still have the loss felt in the United States, because that is where the capital and persons interested are located.

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[212] Brilmayer & Norchi, *supra* note 31, at 1244 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (AM. LAW INST. 1987)).

[213] Universal jurisdiction concerns jurisdiction over heinous crimes. *See* Brilmayer & Norchi, *supra* note 31, at 1244; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 839 (1988). Protective jurisdiction generally concerns national security. *See* Brilmayer & Norchi, *supra* note 31, at 1245. Finally, passive personality concerns protection of the state's nationals abroad, and is generally inapplicable outside of certain criminal law contexts. *See id.* at 1245; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 CMT. G (AM. LAW INST. 1987) (noting that passive personality jurisdiction "has not been generally accepted" for ordinary torts or crimes).

[214] *See* Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 7 (1991).

[215] Brilmayer & Norchi, *supra* note 31, at 1245. The impact theory of territoriality, also referred to as the "effects principle" of jurisdiction, most famously underpins the extraterritorial application of U.S. antitrust laws.

[216] As Curtis Bradley notes, territorial category allows a nation to regulate "conduct within its territory as well as foreign conduct that has substantial effects or intended effects in its territory." Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323.

Nationality theory is trickier.[217] The theory holds that a nation state may exercise jurisdiction respecting "any actions committed beyond its territory by one of its own nationals."[218] Corporate entities domiciled in offshore financial havens may be understood as "nationals" of those jurisdictions, similar to how a nation state may regulate the conduct of its citizens for conduct committed outside of its territory.

This view would impute nationality to corporate entities based on the entities' place of incorporation. The obvious advantage of this method is the creation of a bright-line rule.[219] It is also important to acknowledge that corporations were once conceptualized as if they were natural persons based on their place of incorporation. Classically, a corporation was conceived as "an artificial person, coming into existence through creation by a sovereign power."[220] This early Anglo-American conception of corporate entities dominated court cases during the nineteenth century. As explained by the Massachusetts Supreme Court in the seminal case of *Bergner & Engel Brewing Co. v. Dreyfus*, "a corporation has its domicile in the jurisdiction of the state which created it, and, as a consequence, that it has not a domicile anywhere else."[221]

But those were also the days when the place of incorporation "was indicative of a real and meaningful connection between the corporation and the authorizing state."[222] This is no longer the case, as the rise of corporate entity theory and the dominance of the internal affairs doctrine in the twentieth century rendered the place of incorporation largely irrelevant for deducing actual territorial relationship between

[217] This is particularly the case because the nationality principle as applied to corporate entities has been unsettled for decades. *See* William Laurence Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on* Fruehauf v. Massardy, 83 HARV. L. REV. 579, 589 (1970) ("The international law principles for determining the nationality of corporations are unsettled[.]").

[218] Brilmayer & Norchi, *supra* note 31, at 1245.

[219] As recognized by the U.S. Supreme Court, it would be difficult to structure internal corporate governance rules without the certainty afforded by a bright-line standard like incorporation. *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").

[220] Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 343 (1947).

[221] 51 N.E. 531, 532 (Mass. 1898); *see also* Tung, *supra* note 11, at 54 ("Corporate law had only a territorial effect, and a corporation existed only within the borders of the sovereign that created it."). This understanding is also reflected in the First Restatement of Conflicts, largely mirroring the views of its author, Joseph Beale. *See* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 228-29 (1935); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 41 (AM. LAW INST. 1934).

[222] Linda A. Mabry, *Multinational Corporation and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 587 (1999).

the corporation and the state.[223] Absent some level of real economic activity taking place in offshore financial havens,[224] it is difficult to support the proposition that offshore jurisdictions can exercise prescriptive jurisdiction.[225]

This principle is easy enough to appreciate when comparing the difference between a natural person's domicile and corporate domicile. Domicile of a natural person is a territorial relationship, between the state and the individual.[226] Generally speaking, the domicile concept establishes an individual's legal "headquarters" that in turn regulates a host of bundled rights between the individual and the government unit, including state taxes, voting rights, and education.[227] Domicile for natural persons generally require extended physical presence in the place and specific intent to make home in that jurisdiction.[228] It is because of this unique relationship between the individual and the government unit that state courts principally deduce "interested states" in terms of the domicile of non-corporate litigants in domestic choice of law cases.[229] Indeed, in a great majority of domestic choice of law disputes, "a court using interest analysis simply determines the domicile of the plaintiff and

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[223] Goldsmith, Interest Analysis, *supra* note 33, at 602 n.32; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 CMT. L (AM. LAW INST. 1971); *see also* Tung, *supra* note 11, at 33-36 (explaining the rise of the internal affairs doctrine); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 230, 275 (2015) (explaining in the international investment law context that "the corporation's flexible form affords the multinational business enterprise significant leeway to acquire treaty protection for its contracts with foreign sovereigns").

[224] I am not suggesting that this would be impossible. The point, rather, is that offshore financial havens are currently used precisely to "provide protection from national regulation and taxation without the need to physically relocate to the host country." Palan, Commercialization, *supra* note 45, at 163.

[225] *Cf.* Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 97 (1964) ("No country could so provide without contravening the paramount principle of international jurisdiction, i.e. the requirement of a close connection between the legislating State and the subject-matter of the legislation.").

[226] Goldsmith, Interest Analysis, *supra* note 33, at 600.

[227] *Id.* at 600-03.

[228] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 16, 18 (AM. LAW INST. 1971).

[229] *See, e.g.*, John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651, 653 ("[I]nterest analysis assumes that states have special interests in litigation that affects persons who are domiciled or residing within their borders."). Thus, in the famous case of *Tooker v. Lopez*, involving two New York domiciliaries who were killed in a car accident in Michigan, the court applied New York law, because New York (and not Michigan) had an interest in compensating its injured domiciliary. *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969). As Lea Brilmayer explains, "interest analysis downplays the importance of territorial connecting factors, elevating in their place the domicile of the plaintiff and the defendant." Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement 2D of Conflicts*, 2015 ILL. L. REV. 1969, 1977.

the defendant and then assigns to each party the law of that domicile in ascertaining each state's interest in applying its laws."[230]

Corporate domicile, by contrast, is a contract used to establish the legal relations between members "internal" to corporate entities. As visitors to Wilmington, Delaware will quickly realize, the juridical home of corporate entities can look like nothing more than a small mailbox in a warehouse-like building.[231] Incorporating in an offshore jurisdiction is not so different. Ugland House, an unassuming building located in Georgetown, Cayman Islands, is home to nearly 19,000 corporate entities, often "participants in investment and structured-finance activities, including those related to hedge funds and securitization."[232] The house drew international headlines in 2008 with then-presidential candidate Barack Obama's assessment that the building was "either the biggest building or the biggest tax scam on record."[233] A U.S. government investigative report later revealed that the sole occupant of Ugland House is a law firm that serves as a registration office, with "96 percent of these entities . . . classified as exempted entities under Cayman Islands law," meaning that they are "generally prohibited from carrying out domestic business within the Cayman Islands."[234]

It is perhaps for this reason that federal legislation aimed at regulating corporate entities traditionally looked to the control and ownership of the entities, as opposed to where the entity was formed. This method of imputing corporate nationality traces its origin to early twentieth century federal statutes enacted to establish a jurisdictional basis for subjecting corporations to U.S. law.[235] Thus, for instance, national security laws adopted by the U.S. Congress during and after World War I established restrictions on foreign ownership of firms in key strategic industries

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[230] Goldsmith, Interest Analysis, *supra* note 33, at 601. Indeed, the interest analysis approach has been criticized for overly-relying on domicile as the pre-eminent (or even an exclusive factor) for determining applicable law. As John Corr explains, "the interest of a state other than that in which a party is domiciled may prevail, but it is far more common for the interest of a domiciliary state to dominate." Corr, *supra* note 229, at 654.

[231] A small a humdrum office in North Orange Street in Wilmington, Delaware is the legal headquarters to 285,000 separate businesses, including American Airlines, Apple, Bank of America, and Wal-Mart, among thousands of other entities. *See* Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (July 1, 2012), http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html. Over half of Fortune 500 companies call Delaware their *juridical* home, whereas only two of them operate their physical headquarters in the state. *See* BRUNER, *supra* note 3, at 181.

[232] GAO Report, *supra* note 50, at 1.

[233] KOEN BYTTEBIER, TOWARDS A NEW INTERNATIONAL MONETARY ORDER 264 (2017) (internal citation omitted).

[234] GAO Report, *supra* note 50, at 3. It is perhaps for this reason that courts in the inter-state conflicts cases did not accord weight to corporate domicile as triggering state interest, even as courts were willing to accept domicile of natural persons as triggering state interest. *See* Goldsmith, Interest Analysis, *supra* note 33, at 609-16.

[235] Mabry, *supra* note 222, at 582.

including shipping, broadcasting, and aviation, defining corporate nationality "primarily by reference to the shareholders' nationality, and in some cases, its officers and directors."[236] Moreover, the Export Administration Act of 1979, which prohibited U.S. companies from participating in the Arab boycott of Israel, defined U.S. companies broadly to include foreign affiliates that are "controlled in fact" by U.S. persons.[237] These cases, of course, do not necessarily indicate a uniform approach adopted by Congress. Rather, it shows that laws enacted to regulate the conduct of corporate entities are often "determined by the place from which the corporation is controlled."[238]

To be sure, there is an inherent difficulty in imputing "interest" on a juridical entity—the nation state. While it is easy to anthromorphize the state to advance one's view on what types of sovereign interest ought to count, such an effort is bound to break down under serious intellectual pressure. This is not necessarily because state interest is purely objective,[239] but because there are underlying international norms and enforcement constraints that define the current world order.[240] For instance, North Korea as a theoretical matter may genuinely believe that it can tax red wine produced and sold in California—and present an unambiguously written legislation to prove its intent. But we know that this cannot be, because North Korea has no real mechanism to enforce its laws in California.

Similarly, my argument does not hinge on whether an offshore jurisdiction would subjectively assess that it has an interest in applying its law to a range of disputes external to the corporate entity domiciled in that jurisdiction. After all, it is no secret that the earliest forms of modern tax havens deliberately adapted strategies aimed to attract incorporation business to increase local government revenue.[241] Such an argument is unpersuasive.[242] Consider an analogy from the domestic context. In the

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[236] *Id.* at 586. A paradigmatic example is the Radio Act of 1927. *See* Act of Feb. 23, 1927, ch. 169, § 12, 44 Stat. 1167 (requiring the licensing of all radio station owners and limited the award of licenses to U.S. citizens, with corporate citizenship being defined as corporate entities whose officers or directors were U.S. nationals, and that had 80 percent of their stock owned by U.S. citizens).

[237] Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (expired 1994); Mabry, *supra* note 222, at 582 & n.78. These tests, of course, are not without downsides. For instance, as Mabry suggests, "[d]iscerning the identity and nationality of persons or entities that have the power to influence key corporate decisions is becoming increasingly difficult." Mabry, *supra* note 222, at 590.

[238] Craig, *supra* note 217, at 589.

[239] For a discussion on the subjective and objective ways to construct the concept of state interest, see BRILMAYER, *supra* note 132, at 98-103; Lea Brilmayer, *The Other State's Interest*, 24 CORNELL INT'L L.J. 233 (1991); Roosevelt, *supra* note 25, at 2485-86.

[240] For a general discussion, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 272 (2011).

[241] R.A. JOHNS, TAX HAVENS AND OFFSHORE FINANCE: A STUDY OF TRANSNATIONAL ECONOMIC DEVELOPMENT 20 (1983).

[242] It is entirely possible that offshore financial havens, when asked, would express having an interest in governing particular cross-border transactions. At least theoretically, this increases the fees

United States, Delaware derives a substantial portion of its government revenue from competing (successfully) in the market for corporate registration.[243] But very few would argue that this revenue interest requires applying Delaware law for state regulatory law (e.g., state antitrust law) involving Delaware corporations. Delaware's requirement to have a physical mailbox within the territory of Delaware to opt into Delaware corporate law does not alter this equation.[244] Unbridled subjective interest of sovereigns in the international arena should be reined in not because sovereign interest is necessarily objective, but because it is functionally constrained by the international system.

To be clear, my goal here is not to be the jury in resolving "conflicts" when at least two competing jurisdictions can assert legitimate authority to prescribe the same conduct. The transnational nature of modern commerce necessarily produces instances where conduct in one jurisdiction affects more than one jurisdiction. For instance, the seminal case of *Hartford Fire* involved the extraterritorial application of the Sherman Act to various reinsurance companies in the United Kingdom who allegedly conspired to harm U.S. consumers.[245] Similarly, it is entirely conceivable that some form of economic activity occurs in offshore jurisdictions for certain forms of cross-border commercial transactions. These are situations where an extraterritorial application of federal regulatory statutes may affect other jurisdictions' interest in regulating their own, which can generate the types of regulatory retaliation that the presumption against extraterritoriality is designed to help avoid.[246]

Regulatory litigation involving corporate entities domiciled in offshore financial havens, on the other hand, are often situations that may appear at first to involve the interest of multiple jurisdictions in which only one jurisdiction actually has the authority to prescribe a particular conduct.

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that the governments of these jurisdictions can extract from entities attempting to evade assortments of otherwise applicable laws by their home jurisdictions.

[243] Indeed, Roberta Romano's seminal work on corporate charter competition between states depends on the assumption that franchise taxes represent a substantial source of state revenue. Romano, *supra* note 36, at 280. This assumption may not universally hold. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

[244] Under Delaware law, a corporate entity need not conduct its business in the state to call Delaware its legal domicile. Rather, it needs to file paperwork, pay a franchise tax, and hire a registered agent who "must have a physical street address in Delaware." DEL. DIV. OF CORPS., HOW TO FORM A NEW BUSINESS ENTITY (2017), https://corp.delaware.gov/howtoform.shtml.

[245] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

[246] Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Insurance Co. v. California, 34 VA. J. INT'L L. 213, 220 (1993); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1800 (1992).

C. Jurisdictional Competition and Regulatory Arbitrage: A Reassessment

Even taking out foreign sovereign interests, arguments in favor of international regulatory competition facilitated by territorially-tethered domestic rules do not completely lose their intellectual appeal. When viewing laws as "products,[247] the source of those "products" does not necessarily alter the efficiency gain envisioned by these accounts. That is, whether a rule governing a financial transaction is produced entirely by a private organization (e.g., International Swaps and Derivatives Association),[248] a state (e.g., New York law), or a foreign sovereign (e.g., Cayman Islands law), private choice enables private entities to make welfare enhancing transactions between consenting parties.

Theoretically, thus, offshore corporate form delimiting the application of federal statutes can be conceptualized as emerging virtual spaces built by transnational private contracts enabling private entities to opt out of otherwise mandatory rules.[249] These spaces are in part built by domestic legal rules enabling private entities to accrete growing influence over cross-border economic transactions, under the doctrinal framework of judicial modesty and international comity.[250]

Indeed, functionally, private entities being able to convert mandatory rules into default rules under the shadow of being governed by foreign law, to some extent, mirrors private entities using contracts to select the law governing private relations through choice of law provisions.[251] The latter, which is now a ubiquitous companion to cross-border commercial transactions and increasingly enforced by both national courts and private arbitration houses, effectively allows private entities

[247] Romano, *supra* note 36, at 225-27.

[248] For an excellent primer on the transnational private regulation of over-the-counter derivatives, see Gabriel V. Rauterberg & Andrew Verstein, *Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform*, 54 VA. J. INT'L L. 9 (2013).

[249] As Henry Hansmann and Reinier Kraakman explain, commercial legal entities are "simply standard-form contracts among the parties who participate in an enterprise—including, in particular, the organization's owners, managers, and creditors." Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000). Corporate structuring in the transnational context, to a certain extent, may be intellectually grounded in neoliberalist thought that tends to support "particular market imperatives" against "political intervention." David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2014). As David Grewal explains, neoliberalism in both domestic and transnational contexts "privileges relations of sociability and mistrusts those of sovereignty, since (on its own account at least) the latter are distorted and corrupted by power in a way the former are not. Instead, neoliberals place their faith in those activities that people undertake as individuals choosing to participate in broader structures of social life." DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 247 (2008).

[250] *See, e.g.*, Brilmayer, New Extraterritoriality, *supra* note 118, at 656 (critiquing the Supreme Court's opinion in *Morrison* as being littered with "pretensions to judicial modesty").

[251] *See* RIBSTEIN & O'HARA, *supra* note 37, at 1-12.

to "legal regime shop" without establishing any territorial connection with the preferred jurisdiction.[252] Importantly, recent U.S. court jurisprudence in many cases allows private entities to opt out of a range of otherwise mandatory statutes by contractually stipulating to be governed by foreign law.[253] Both mechanisms—offshore corporate domicile and private contracts—allow private entities to opt out of bundles of local rules without physically exiting that jurisdiction. Theoretically, the support for this line of "private choice" approaches to cross-border commercial transactions tend to reason that choice enables private entities to be governed by law that best suit their needs. As an added benefit, it may encourage competition between jurisdictions to produce innovative law.[254]

I am skeptical of these views because normative accounts that focus on effectuating private choice and efficiency—a predominant focus of private law scholarship[255]—are often dependent on the view that regulatory laws serve no social purpose.[256] At the very least, there are reasons to cast doubt on this viewpoint, given that private benefits and costs may not necessarily align with the social benefits and

[252] *See* Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 692 (2013) ("For many types of contracts today, courts routinely and nearly uniformly enforce choice-of-law clauses."). Interestingly, the contemporary private governance of transnational commercial activities has also been expressly conceptualized as "offshore" or "virtual spaces." *See* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 35 (2017) (describing a transnational private arbitral governance of transnational business as a "space" that makes "no sovereignty claims over people or territory"); Alec Stone Sweet, *Islands of Transnational Governance*, 122, 123, *in* RESTRUCTURING TERRITORIALITY: EUROPE AND THE UNITED STATES COMPARED (Christopher K. Ansell & Giuseppe Di Palma eds., 2004) ("[S]overignty and control are detaching from one another rapidly, at least with respect to transnational commercial activity. In the past three decades, a growing and increasingly cohesive community of actors . . . have successfully created a transnational space. The space is comprised of a patchwork of private jurisdictions, of rules and organizations without territory, an offshore yet virtual space. These are islands of private, transnational governance.").

[253] *See* William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. (forthcoming 2018).

[254] RIBSTEIN & O'HARA, *supra* note 37, at 5-12. The private choice rationale, albeit not directly commented in the offshore context, also is prominently advocated in the field of securities regulation by those who argue for an "issuer choice" model of regulation. For seminal accounts, see Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998).

[255] *See* Grewal & Purdy, *supra* note 249, at 15 ("[P]rivate-law scholarship has largely organized itself around the concept of efficiency, whether devising efficiency-enhancing reforms or debating the correct definition of efficiency and the appropriate scope of efficiency concerns.").

[256] Joel Trachtman makes this observation in the securities law context. Trachtman, Economic Analysis, *supra* note 30, at 26 (arguing that issuer choice-based theories to securities regulation "are dependent on an assumption that securities regulation serves no social purpose: that there is no externality worthy of being internalized by regulation").

costs.[257] Tax incentives, for instance, may induce private entities to opt into an offshore jurisdiction's legal regime, even when this structure may not be desirable from the general public's standpoint.[258]

Even assuming efficiency gains attributable to private entities being able to opt out of a set of otherwise mandatory laws, the jurisdictional competition theory holds less persuasion when private transactions tend to impose externalities on third parties.[259] The lack of externalities, fatally, is an assumption largely shared by proponents of jurisdictional competition, who owe their intellectual roots to the Tiebout model. The model, developed by Charles Tiebout in a 1956 article,[260] posits that competition among cities for mobile individuals results in the efficient supply of local public goods by those cities. While advancing the debate considerably, the Tiebout model, like many economic theories, presupposes the absence of externalities.[261]

Thus, even from an efficiency standpoint, the gains envisioned by proponents of international regulatory competition are empirically unproven.[262] In regulatory theory, the mandatory nature of certain statutes, including antitrust, most securities regulation and practically all criminal law, exists "where the regulated person does not absorb all of the effects, adverse, or beneficial, of his or her action."[263] As explained by Joel Trachtman, "the mandatory nature of a law is an indicator, and is

[257] Proponents for leaving private commercial transactions entirely to private bargaining tend to underappreciate that there are social impacts of private transactions that are not necessarily internalized by contracting parties. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 58 (2013) (explaining in the racial restrictive covenants context that "social impacts . . . are not necessarily internalized by the initial contracting parties").

[258] *See* Moon, Tax Havens, *supra* note 71.

[259] Externalities is a loaded concept in both economics and law. For my purposes, I refer to the range of costs and benefits borne by the society at large other than those engaged in private transactions. For a seminal account of externalities, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

[260] *See* Charles E. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Under Tiebout's model, the threat of physical exit from the state incentivizes states to provide public goods, including the bundle of laws imposed on its subjects.

[261] Trachtman, Economic Analysis, *supra* note 30, at 27 ("[T]he Tiebout model depends on a number of assumptions, including the absence of externalities [.]").

[262] Indeed, even in the domestic context, "[a] number of economists have also advocated general legal restrictions on private agreements to deal with undesirable externalities[.]" Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 1017 (2006) (collecting sources).

[263] *Id.* at 17. Mandatory structural rules imposed by the state may also be designed to solve coordination problems endemic to certain business transactions. *See, e.g.*, Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1808 (1998) ("That bankruptcy systems solve a coordination problem rather than regulate the substance of transactions accounts for some of the distinctions between bankruptcy and commercial law generally. . . . Structural rules of the game must be mandatory or the game cannot be played at all.").

perhaps the best evidence, that the law addresses externalities in the private sector that would ordinarily be expected to translate into interstate externalities[.]"[264]

To be sure, one's view on how "mandatory" a set of rules ought to be is undoubtedly influenced by his or her view on whether and to what extent domestic laws are infected by the rent seeking behavior of various interest groups. This is the influential public choice theory that in part motivates the private choice-driven approach to regulatory law.[265] While there are surely domestic laws that reflect this premise, that generalization does not stand up to serious scrutiny as a universal theory. It seems at least equally plausible that "legislation incorporates the public interest as well as possible given institutional constraints."[266] Indeed, as Robert Wai reminds us, "the policy goals of private law include social regulation: to provide public goods, to correct for market failure, and to contribute to social deterrence."[267]

Efficiency is wonderful, but not at the cost of accepting a watered-down conception of the law. Bankruptcy law, for instance, may be conceptualized as a set of rules governing the relationship between the creditor and the debtor.[268] But it could also be understood as laws designed to effectuate certain policy goals that take into account other stakeholders affected by corporate bankruptcies.[269] Securities regulation may be purely examined as the law governing the relationship between

[264] *Id.* at 6.

[265] *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991) ("[W]e cannot simply take for granted that the legislature represents the public interest. Realistically, we must also consider the possibility that a statute represents private rather than public interests, because of the undue influence of special interest groups. Alternatively, a statute may fail to represent any identifiable 'public' interest because the public itself is too fragmented to generate any coherent public policy."). For important work applying the public choice theory to regulatory law governing private transactions, see O'HARA & RIBSTEIN, *supra* note 37; Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce*, 51 EMORY L.J. 1 (2002); and Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245 (1992).

[266] Trachtman, Economic Analysis, *supra* note 30, at 16.

[267] Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 474 (2005).

[268] In a seminal piece, Douglas Baird and Thomas Jackson famously articulated the goal of bankruptcy law as enhancing the collection efforts of those "who, outside of bankruptcy, have property rights in the assets of the firm." Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984).

[269] Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 343 (1993) (arguing that bankruptcy law constitutes "a collection system that determines the value of a failing business, how to distribute that value among parties whom the failure affects, and the extent to which affected parties can externalize the costs of failure to others who did not deal with the debtor"). In some respects, transnational private adjudication of bankruptcy disputes present parallel issues of private parties circumventing domestic mandatory laws. STONE SWEET & GRISEL, *supra* note 252, at 184.

investors and issuers.[270] But it may also be understood as laws designed to deter fraud and assortments of market failures that have resulted in mass externalities borne by the general public.[271] The list can go on and on.[272]

The private choice rationale espoused by efficiency-oriented scholars is particularly hard to justify when legislatures, as in the cases of statutes like civil RICO, include treble damages provision for successful private litigants.[273] The overcompensation of the plaintiff is perhaps the clearest indication of the legislature relying on "private attorney generals" to complement the efforts of public enforcement agencies to effectuate particular legislative aims.[274] The United States famously relies on a diffused system of enforcement mechanism relying on both public regulatory agencies and private litigants to effectuate legislative aims. Reliance on public enforcement alone, under this structural design, is unlikely to detect enough violations of any given statute.[275] This is because private litigants, through pursuit of their own interests, "serve larger social purposes of regulation."[276] This point is critical to understanding the underappreciated role of private litigants in detecting violations of public regulatory law. While private litigants often do rely on the investigative efforts of public agencies like the Securities and Exchange Commission or the Department of Justice to bring private claims, the reverse is also true: public regulators, in some cases, decide to bring enforcement actions following

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[270] Mandatory rules imposed by a domestic legal regime, under this view, may be overly restrictive on welfare-enhancing private transactions. *See* O'HARA & RIBSTEIN, *supra* note 37, at 1-10.

[271] As Merrit Foxx observes, "absent regulation, firms can be expected to disclose less than is socially optimal." Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2551 (1997).

[272] *Cf.* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 659 (2014) (reviewing THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014)) ("[L]aw structures not just the particular bargains in capitalism . . . but also the broader social and political setting of the market.").

[273] 18 U.S.C. § 1964(c) (2012) (providing that a successful plaintiff under civil RICO "shall recover threefold the damages he sustains and the cost of the suit").

[274] The term "private attorney generals" was coined by Judge Jerome Frank. *See* Associated Industries of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."); *see also* Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453, 462 (2015) ("In legislating private securities fraud, Congress reaffirmed the critical policy considerations that had previously been identified by the Court. Congress explicitly recognized the importance of private litigation as a supplement to public enforcement efforts.").

[275] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 96 (2005) (arguing that private litigants in the United States play an important role in "deterring, detecting, and correcting socially harmful violations of the law").

[276] Wai, *supra* note 267, at 474.

the initiation of private litigation.[277] This should be unsurprising, given that private litigants, in certain situations, are at an institutional advantage by the virtue of having "[t]he best source of information about private wrongs[.]"[278]

The laws of offshore financial havens give little reason for comfort.[279] In particular, there is a particularly acute concern for a race to the bottom enabled by the phenomenon of "legislative capture,"[280] whereby private entities can opt into desirable bundle of rules by literally writing the laws of foreign jurisdiction.[281] Perhaps the most salient example is the case of the Cook Islands in the South Pacific Ocean, a jurisdiction that pioneered laws in late 1980s "devised to protect foreigners' assets from legal claims in their home countries."[282] The Cook Islands trusts law was written with Americans in mind, by Colorado-based lawyer Barry Engel.[283] Cook law, unsurprisingly, offers strict bank secrecy rules and refuses to recognize or enforce foreign judgments.[284] The government of Cook Islands generates revenues in the form of "registration fees, taxes on trust companies and their employees, and various support services."[285]

Legislative capture is a phenomenon especially vulnerable to the governments of small offshore jurisdictions looking to convert their lawmaking authority into staple revenue streams. It is no secret that interested private parties work intimately with local legislatures in offshore financial havens. One "offshore magic circle" law firm, for instance, even advertises "its close working relations with tax haven

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[277] John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working*, 42 MD. L. REV. 215, 216, 223 & n.18 (1983).

[278] Glover, *supra* note 275, at 1154.

[279] As Steven Ratner observes, "the desire of many less developed states to welcome foreign investment means that some governments have neither the interest nor the resources to monitor corporate behavior, either with respect to the multinational's employees or with respect to the broader community." Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461-62 (2001).

[280] James Kwak, *Incentives and Ideology*, 127 HARV. L. REV. F. 253, 256 (2014) (describing legislative capture as "the ability of industry to use its financial clout to influence Congress and, indirectly, agencies that are overseen by Congress").

[281] A related phenomenon of "regulatory capture" is a concept well-developed in the economic policy literature. Regulatory capture is broadly understood as "process through which special interests affect state intervention in any of its forms, which can include areas as diverse as the setting of taxes, the choice of foreign or monetary policy, or the legislation affecting R&D." *See* Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 203 (2006).

[282] Leslie Wayne, *Cook Islands, a Paradise of Untouchable Assets*, N.Y. TIMES (Dec. 14, 2013), http://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html.

[283] *Id.* ("A Cook official, seeking revenue for the islands, read in The Economist about Mr. Engel's firm, which was pioneering the concept of asset protection trusts, and hired Mr. Engel to help write the 1989 law.").

[284] Reuben W. Tylor, *Effective Firewall Legislation—Cook Islands*, 14 TRUSTS & TRUSTEES 685 (2008).

[285] Wayne, *supra* note 282.

governments[.]"[286] Other law firm partners have been members of the local legislatures of notorious tax havens.[287] The transnational public-private collaboration is not a mere theoretical inquiry. In a recent case before the Fifth Circuit, victims of a Ponzi scheme brought an action against the island nation of Antigua for playing a role in facilitating a $7 billion Ponzi scheme involving Allen Stanford.[288] While the suit was thrown out for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, defrauded investors pleaded (with substantial evidence) that "Antigua accepted numerous loans and other financial contributions from Stanford and in return provided him with a significant amount of influence over Antigua generally, and especially over its financial regulatory sector."[289]

CONCLUSION

The world does not have to be this way. To be sure, capital mobility enabled by technological advancements enhances the ability of private actors to shift the locus of financial transactions outside of any particular jurisdiction. Indeed, it is this mobility that enabled states to compete for corporate charters in the domestic corporate law context.[290] But any claim suggesting that offshore finance is beyond the regulatory reach of the United States is exaggerated at best, given that shifting property and human capital entirely offshore is a significant enterprise. At least in the near future, nation states "still wield total formal authority over resources and capabilities in their territories."[291]

A cramped vision of domestic interest embraced by recent Supreme Court opinions on the spatial reach of federal statutes seems to romanticize old-fashioned territorialism that received the scholarly burial that it deserved in the mid twentieth century. But this line of jurisprudence should be more alarming than ever before. In today's world, territorially-tethered laws promise not only to produce arbitrary results, but risk breeding cottage industries of private regulatory evasion.[292] The emergence of the offshore world, in my view, has less to do with respecting the

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[286] John Christensen, *Do They do Evil? The Moral Economy of Tax Professionals*, 72, 80, *in* NEOLIBERALISM AND THE MORAL ECONOMY OF FRAUD (David Whyte & Jörg Wiegratz eds., 2016).

[287] *Id.*

[288] Frank v. Commonwealth of Antigua & Barbuda, 842 F.3d 362, 365-67 (5th Cir. 2016).

[289] Frank v. Antigua & Barbuda, No. 3:09-CV-2165-N, 2015 WL 13173102, at *1 (N.D. Tex. June 26, 2015).

[290] Tung, *supra* note 11, at 46 ("Legislatures could not afford to . . . driv[e] business out of state to the detriment of local interests.").

[291] Brummer, *supra* note 42, at 524. Indeed, the private system of governance for contemporary transnational business more generally is critically dependent on acquiescence and active support of domestic rules. *See* STONE SWEET & GRISEL, *supra* note 252, at 60.

[292] Avi-Yonah, *supra* note 92, at 1575 (attributing international tax competition to the mobility of capital, which resulted from "technological advances as the electronic transfer of funds and the relaxation of exchange controls").

interest of foreign sovereigns, than with private entities bootstrapping foreign sovereign interest in the name of building and expanding the ever-more unregulated juridical spaces to conduct modern financial transactions.